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IN THE

Supreme Court of the United States

October Term, 1986

CITY OF WILDWOOD,

Petitioner,

-vs-

ANTOINETTE CONNIE ANELA, ANGELA DIPIETRO, MAUREEN McDONNELL, LISA TORTIS, GINA BUCCERI and ROXANN COX COLE,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) and *Pembaur v. Cincinnati*, 54 U.S.L.W. 4289 (1986), liability may be imposed upon a municipality under 42 USC § 1983 on the basis of a *single* document which:

a) is an Order of a *state* Judge setting bail and bail procedures for specified offenses; and

b) is not linked by any evidence to the plaintiffs' injuries?

2. Whether municipal officials (in this case police officers) must undertake an independent analysis of the constitutional vailidity of a Judge's Order, and ignore such Order if it is considered unconstitutional, in order to escape the imposition of liability upon the municipality under 42 USC § 1983?

3. Whether the failure by municipal police officers to follow the arrest procedures set forth in a State Court Rule constitutes a *per se* violation of the United States Constitution for which the municipality may be held liable under 42 USC § 1983?

4. Whether the 12-hour overnight pre-arraignment detention of plaintiffs, who had insufficient funds to post bail, constitutes "punishment" in violation of the constitutional standards set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979)?

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No.

IN THE

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CITY OF WILDWOOD,
Petitioner,

-vs-

ANTOINETTE CONNIE ANELA, ANGELA DIPIETRO, MAUREEN McDONNELL, LISA TORTIS, GINA BUCCERI and ROXANN COX COLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

CITY OF WILDWOOD, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this matter on May 22, 1986.

OPINIONS BELOW

The May 22, 1986 opinion of the Court of Appeals whose judgment is herein sought to be reviewed is reported at 790 F.2d 1063 and is reprinted in Appendix A hereto. The June 19, 1986 decision and dissenting opinion on petition for rehearing in banc are reported at 793 F.2d 514 and are reprinted in

Appendix B. The prior bench opinions of the United States District Court for the District of New Jersey are reprinted in the Appendix as follows: 1) On Motion for Directed Verdict, dated May 7, 1985, Appendix C; 2) On Motion for Reconsideration, dated June 21, 1985, Appendix D; and 3) On Motion for Summary Judgment, dated April 6, 1984, Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1986. On June 19, 1986, the Court of Appeals denied the Petition for Rehearing In Banc. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

[Section 1. Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

[42 USC § 1983. Civil action for deprivation of rights.]

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284.)

NEW JERSEY COURT RULES

[Part III. Ruled governing criminal practice.]

Rule 3:1-1. Scope.

The rules in Part III govern the practice and procedure in the Superior Court in all criminal proceedings and, insofar as they are applicable, the practice and procedure on *indictable* offenses in all other courts, and the practice and procedure in juvenile delinquency proceedings in the Chancery Division, Family Part except as otherwise provided for in Part V. (Emphasis added.)

Rule 3:4-1. Procedure After Arrest.

(a) A person arrested under a warrant issued upon a complaint shall be taken, without unnecessary delay, before the court named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available committing judge and a complaint shall be filed forthwith and either a warrant issued thereon or, if the person taking the complaint has reason to believe that the defendant will appear in response to summons, a summons

issued. The judge before whom the arrested person is taken shall advise such person of his rights in accordance with R. 3:4-2.

(b) Subject to paragraph (c) hereof, whenever a law enforcement officer has effected a lawful arrest without a warrant for any offense except murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assualt, aggravated criminal sexual contact, criminal sexual contact, aggravated assault, aggravated arson, arson, burglary, violations of the Controlled Dangerous Substances Act, excluding minor possessory offenses, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes, the arrested person shall be taken to a police station where the officer in charge shall, after completion of all post arrest identification procedures required by law, issue a summons to him and release him in lieu of continued detention unless he determines that any of the conditions set forth in paragraph (c) hereof exists.

(c) The officer in charge of the stationhouse shall have the discretion not to issue a summons to an arrested person when any of the following conditions exists:

(1) The person has previously failed to respond to a summons;

(2) The officer has reason to believe that the person is dangerous to himself, to others or to property;

(3) There is one or more outstanding arrest warrants for the person;

(4) The prosecution of the offense or offenses for which the person is arrested of the prosecution of any other offense or offenses would be jeopardized by immediate release of the person;

(5) The person cannot provide satisfactory evidence of personal identification;

(6) The officer has reason to believe the person will not appear in response to a summons; or

(7) The person demands to be taken before a judge.

[Part VII. Rules governing practice in the municipal courts.]

Rule 7:3-1. Complaint; Warrant or Summons; Preliminary Hearing. [In relevant part]:

The provisions of. . .R. 3:4-1 (appearance before committing judge). . . are applicable to municipal courts in respect of all *non-indictable* offenses, *except* as follows:

....

(d) A summons *may* issue in lieu of a warrant if the person taking the complaint has reason to believe that the defendant will appear. (Emphasis added.)

Rule 7:5-3. Authority to Admit to Bail.

In any case in which the municipal court judge has fixed the amount of bail, he may designate the taking of the recognizance by the clerk or any other person authorized by law to take recognizances, other than the arresting officer. In the absence of the judge, a person arrested and charged with a non-indictable offense which may be tried by the judge, may, before his appearance before him, be admitted to bail by the clerk of the court; and in the absence of the judge and the clerk, may be admitted to bail by any other person authorized by law to admit persons to bail other than the arresting officer, designated for such purpose by the judge.

STATEMENT OF THE CASE

This civil rights action was brought pursuant to 42 USC § 1983 through a series of complaints which were consolidated by Order of the United States District Court for the District of New Jersey on August 29, 1983. Plaintiffs, all young women aged 17 and 18 at the time of the subject incident, alleged violations of their rights under the Due Process Clause of the Fourteenth Amendment in connection with their arrest in the City of Wildwood, New Jersey on the night of July 3, 1981. The plaintiffs seek to impose liability upon the City of Wildwood ("City") on the basis of alleged policies and practices of the City.

The Evidence

Plaintiffs were arrested at their leased summer residence at approximately 11:15 p.m. on the night of July 3, 1981 for violation of the local noise ordinance, after an earlier warning by police officers had gone unheeded. (Ja506-17 and 545-2).[1] Subsequent to their arrest, plaintiffs and three other individuals arrested with them were taken to the police station.

Shortly after plaintiffs' arrival at the police station it was discovered that one of the arrestees was a minor. She was subsequently released in the custody of her mother and no charges were lodged against her. (Ja198-11). Another plaintiff who was also a minor at the time actually lied to the police about her age because she preferred to remain detained with her friends rather than call her parents. (Ja222:21-223:17).

Of the five plaintiffs charged, none asked to post bail nor did any of them have in their possession sufficient cash with which to post bail. (Ja183:4-9; 204-16, 210-14; 217-15, 221-6; 236-22, 242-10; 247:20-248:2, 252-22). Only one of the plaintiffs requested permission to make a telephone call. (Ja205-9). However, when that same plaintiff was required to call the minor's mother (Ja206-3), she did not ask that her own parents

[1] References herein are to the record below and are included as a courtesy to respondents.

be contacted and advised of her arrest (Ja209-9), despite the fact that she had relatives in the City who, if contacted, could have been at the police station within a few minutes with sufficient cash to post her bail. (Ja212-16). Thereafter, due to the lateness of the hour and their inability to post the required cash bail, plaintiffs were placed in detention cells in the police station.

As a result of limited detention space in the police station, plaintiffs were placed three to a cell but were at all times together with their friends. During their detention, only one the plaintiffs made any request of the matron on duty, i.e. for a cup with which to get water from the sink in the cell. (Ja249-7). At approximately 11:00 a.m. on the following morning, a national holiday, plaintiffs appeared in municipal court where they all plead guilty to the charge against them, paid the fine of $150 dollars and were released. (Ja576:4-19; 577-9).

Each of the plaintiffs testified unequivocally at trial that she suffered no physical or emotional injury as a result of her arrest and overnight detention. (Ja182:8-25; 197:18-198:2; 209:22-210:2; 221:7-25; 241:21-242:2; 251:25-252:12). On the contrary, each testified that the police officers with whom she had come in contact on the night of July 3, 1981 were courteous and polite throughout. (Ja178-2; 197-10; 209-15; 242-3; 251-17).

Despite the facts that plaintiffs acknowledged more than one police warning (Ja507:10-16), plead guilty to the charge against them, had insufficient cash with which to post bail, were treated courteously and permitted to remain with their friends throughout and, most importantly, suffered absolutely *no* injury, plaintiffs instituted this action seeking damages for violation of their constitutional rights.

The Rulings Below

On motion for directed verdict brought at the conclusion of

plaintiffs' case[2], the district court, noting that there had been no testimony as to any City policy or practice, ruled that the plaintiffs had not presented "the slightest suggestion of proofs...in order to visit liability under the applicable law upon a municipal government...." Appendix C, page 29a. Nevertheless, citing no supporting testimony, the circuit court panel opinion states that the City "routinely detained persons over night for minor offenses..." and that this conduct was "a settled practice or policy of the City's decision makers...." Appendix A, pages 7a and 9a. Based upon these unsupported findings the panel held that the unconstitutional detention of the plaintiffs was attributable to the City. Appendix A, page 14a.

After granting the City's motion for directed verdict, the district court considered plaintiffs' motion to reopen their case in order to submit additional exhibits as evidence of a City policy. As the circuit court panel recognized, plaintiffs made no offer of proof of a City policy beyond the facts shown on a Cash Bail Schedule issued by Order of Municipal Court Judge John Corino. Appendix A, page 4a. After admitting the Cash Bail Schedule into evidence, the district court observed that it was undated and "[f]or all the evidence shows, it was not applicable at the time...." Appendix C, page 32a. The district court then held that even were the Cash Bail Schedule applicable at the time of plaintiffs' arrest, it could not be attributed to the City. Taking judicial notice as a "forum court in the State of New Jersey and applying New Jersey law...on a routine basis, that the municipal courts of the State of New Jersey...are not within the control or variation...of the municipal authorities," the district court stated:

> It's preposterous, it seems to me, to suggest that the Municipal Court or its promulgated orders, constitute

[2] At trial, plaintiffs presented the testimony of each of the plaintiffs and two additional witnesses who were arrested with plaintiffs. At the end of this testimony plaintiffs rested, "subject only to the right of putting on rebuttal testimony." (Ja257-18).

[3] Circuit Judge Adams, dissenting from the denial of petition for rehearing, disagreed that the plaintiffs had established a violation of their constitutional rights. Appendix B, page 23a.

> an expression of the authority of the municipal corporation. It seems to me a complete disregard of the separation of functions, powers and authority.

Appendix C, page 32a.

The district court denied plaintiffs' subsequent motion for reconsideration and a new trial, stating that:

> *Monell* requires that the illegal acts to be a basis for municipal liability be the effectuation of an official policy. The policy here effectuated was not the City's. Moreover, nothing in the New Jersey Court Rules mandated that the City pursue a contrary policy. Immediate release of misdemeanants was discretionary and the municipal judge, via his bail policy, in effect took away any discretion the City might have had.

Appendix D, page 50a.

On appeal, the majority of the circuit court panel reversed and held that the City was liable for violating plaintiffs' consitutional rights because the City had failed to comply with New Jersey Court Rule 3:4-1. The majority of the panel first held that Rule 3:4-1 *required* the police officers in this case to issue a summons to the plaintiffs rather than arrest and detain them.[4] Assuming, without factual basis, that the City "routinely followed" the Cash Bail Schedule, the panel majority then held that "[t]he issuance of a bail schedule by the municipal court does not excuse City officials from complying with the New Jersey Supreme Court's rule" because "[p]rivate citizens are presumed to know the law and no less should be expected of public officals when they detain and confine persons." Appendix A, page 9a. It should be noted that one member of the panel dissented from this portion of the decision stating that:

---

[4] The panel made no comment concerning the City's argument that the applicable Court Rule is Rule 7:3-1 (cited *supra*), under which the immediate release of misdemeanants is discretionary.

> ...there is no evidence that the Wildwood police or any other Wildwood employee knew that the Municipal Judge's bail schedule was invalid. In my view, the police should be entitled to follow the orders of a state court without first analyzing those orders to determine whether they are constitutionally sound. (Citations omitted).

Appendix A, page 17a. Circuit Judge Adams, in his dissent to the denial of petition for rehearing, also disagreed with the majority opinion of the panel, expressing the view that "imposition of municipal liability based upon this single document is in direct contradiction to the Supreme Court's teachings in *Monell*...." Appendix B, page 23a.

The circuit court panel also reversed the district court's ruling concerning the conditions of confinement complained of by the plaintiffs (i.e. 12 hours, three to a cell with no food, water or mattresses). On motion for summary judgment heard on April 6, 1984, the district court held that the alleged conditions did not violate the constitution as a matter of law. Citing *Bell v. Wolfish, supra*, the court concluded that:

> Given the rather brief time involved in this case, the court holds that what the plaintiffs experienced was not punishment but simply an unpleasant inconvenience. While three-to-a-cell may generally be intolerable, it ought not to be so for 12 hours, particularly when it is remembered that the young ladies were not placed with strangers but were celled with each other. Certainly the deprivation of food and water is inexcusable, but again, this court finds it not to be egregious in the short haul.

Appendix E, pages 55a - 56a. Having so ruled, the district court had no cause to consider whether the conditions of confinement resulted from a policy or practice of the City. Notwithstanding the limited record below, the circuit court panel found that the jail conditions appeared to be "the norm" and stated that:

> The description of the cells revealed a long-standing condition that had become an acceptable standard and practice for the City. The City offered no evidence rebutting the absence of beds or even mattresses, or its failure to provide food or drinking water.

Appendix A, page 14a. After concluding that the conditions of confinement were unconstitutional, the panel found, despite the lack of any supporting evidence, that "these detention conditions constituted a City custom or usage." In his dissent to the denial of petition for rehearing in banc, Circuit Judge Adams commented on this portion of the panel's decision and stated that: "there appears to be no justification for the conclusion that the record establishes a deprivation of due process as a matter of law." Appendix B, page 22a.

Finally, on June 19, 1986, the Court of Appeals, by a margin of nine to four, denied the City's petition for rehearing in banc. Appendix B, page 19a. In a dissenting opinion, portions of which are referenced herein, Circuit Judge Adams expressed his disagreement with that denial and with substantial portions of the panel opinion as well. Appendix B, page 20a.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH OTHER LOWER COURTS.

The paramount issue in this case concerns the basis upon which liability for constitutional violations may be imposed on a municipality under 42 USC §1983. However, the Court of Appeals decision is so framed as to require consideration of four distinct questions: 1) may liability be imposed upon the City on the basis of a policy established by order of a *state* judicial officer; 2) is violation of a State Court Rule a *per se* violation of the United States Constitution; 3) may liability be imposed upon the City for the conduct of its police officers who, in the execution of their law enforcement duties, comply with a judicial order which is later found to violate either state law or the Constitution; and 4) if the answer to any of the foregoing is affirmative, may liability be imposed upon the City in the absence of any evidence linking the plaintiffs' injuries to the offending City policy or practice. The Third Circuit rulings on each of these questions contradicts settled precedent in this Court and conflicts with decisions in the other Circuits.

Policies Attributable To The Municipality

Monell v. New York City Department of Social Services, *supra*, teaches that "a municipality cannot be held liable under §1983 on a respondeat superior theory." *Id.* at 691. Rather, the municipality may be held liable only where "some official policy (or custom) 'causes' an employee to violate another's constitutional rights." *Id.* at 692. More recently, this Court has held that:

> ...municipal liability under §1983 attaches where - and only where - a deliberate choice to follow a course

> of action is made from among various alternatives *by the official or officials responsible for establishing final policy with respect to the subject matter in question.* (Citation omitted.)(Emphasis added.)

Pembaur v. Cincinnati, supra at 4293. Finally, "whether an official had policy making authority is a question of state law." *Ibid.*

In this case, the district court ruled that the municipal judge, by whose order the Cash Bail Schedule at issue was established, was not a municipal policy maker. Therefore, the Cash Bail Schedule, even if followed by City police officers on the night of plaintiffs' arrest, could not be attributed to the municipality. This decision is consistent with New Jersey law under which the judge is exclusively vested with authority to determine the amount of bail and to set bail procedures. *See* New Jersey Court Rule 7:5-3, *supra. See also, In re Lucas,* 136 N.J. Super. 24, 37 (Law Div. 1975), aff'd 136 N.J. Super. 460 (App. Div. 1975). It is also clear under New Jersey law that a municipal judge is a part of the state-wide judicial system, exercises the judicial power of the state, and acts, in his judicial capacity, outside the control of the municipality. *Kagan v. Caroselli,* 30 N.J. 371 (1959). *See also, Robinson v. Kreischer,* 97 N.J. Super. 104, 115 (Ch. Div. 1967), aff'd 101 N.J. Super. 482 (App. Div. 1968), holding that "a magistrate is not part of the mayor's family for whom he is responsible."

In concluding that the City "routinely followed" the Cash Bail Schedule established by the municipal judge, the Circuit panel did not discuss how such a policy, established by a state judicial official, could be attributed to the City. Rather, the panel held that City police officers should have ignored the judicial order and followed other authority in its stead. It is submitted, as stated by Circuit Judge Adams in his dissent to the denial of petition for rehearing, that imposition of municipal liability based solely upon the Cash Bail Schedule "is in direct contradiction to the Supreme Court's teachings in *Monell* and its subsequent opinions interpreting *Monell.*" Indeed, as observed by Circuit Judge Adams, the majority panel decision "seems

to be nothing more than the imposition of liability on a respondeat superior basis." Appendix B, page 23a.

Violation Of A State Court Rule

Although proof of unconstitutional conduct is an essential predicate to a determination of municipal liability under §1983, the circuit court opinion never expressly states that the 12-hour pre-arraignment detention of the plaintiffs was unconstitutional. Indeed, the panel does not discuss the constitutional standards for pre-arraignment detention at all. Rather, the panel held that violation of a State Court Rule is *per se* unconstitutional when it stated that "Rule 3:4-1 specifically and unequivocally required the City to pursue a contrary policy." Appendix A, page 8a. The majority of the panel held that the City was liable to the plaintiffs precisely because it had "routinely" ignored the arrest procedures set forth in the State Court Rule. Appendix A, page 14a.

Directly contrary to this basis for establishing a constitutional violation is the decision of the Fourth Circuit Court of Appeals in *Fisher v. Washington Metro. Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982). In *Fisher*, as in the instant case, the plaintiff alleged that her Fourteenth Amendment rights had been violated as a result of the arresting officer's failure to comply with local law respecting her arrest and detention. Ms. Fisher was arrested by a transit authority officer for violating a local ordinance which prohibited eating on the train. She was then transported to the Arlington County police station where she was detained for 15 hours. The law at issue was a Virginia statute requiring that misdemeanants be released with a summons and without further custody unless they refused to sign the summons or were believed unlikely to appear for trial. The Virginia statute, quoted in the decision, contains instructions and exceptions similar to those contained in New Jersey State Court Rule 3:4-1. Holding that the plaintiff's claims for an unconstitutional arrest followed by an unconstitutional detention must fail as a matter of law, the court stated:

The constitutional right asserted by [plaintiff] in these

> §1983 claims must be sought ultimately in the fourth amendment as made applicable to state action by the fourteenth. For it is from the "Fourth Amendment and its common-law antecedents" that "the standards and procedures for arrest and detention have been derived." *Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S.Ct. 854, 861, 43 L.Ed. 2d 54 (1974).
>
> ....
>
> Where, as here, the claimed violation is by state action, binding precedent in this circuit has it that the constitutional standard is not affected by the fact that a state law may impose a more stringent arrest standard upon state police officers. *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974). "The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right." *Id.* at 372. Probable cause remains the sole constitutional standard by which this §1983 claim is to be judged.

Id. at 1138. *Accord, United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983); *McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984); *Slotnick v. Staviskey*, 560 F.2d 31, 34 (1st Cir. 1977), cert. den. 434 U.S. 1077 (1978). *See also, Screws v. United States*, 325 U.S. 91 (1945), where this Court construed the reach of the "under color of law" formula which appears in the criminal counterpart to §1983. Writing for the majority of the Court, Justice Douglas stated:

> ...there is no warrant for treating the question in state terms. The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under "color of any law."
>
> ....
>
> Violation of local law does not necessarily mean that federal rights have been invaded.

Id. at 108.

The City's Duty To Determine The Constitutionality Of A Judge's Order

In reaching the conclusion that State Court Rule 3:4-1 compelled "the City to pursue a contrary policy," Appendix A, page 8a, the circuit panel essentially held that City policy makers should have 1) undertaken an independent analysis of Rule 3:4-1 (a rule of questionable application to the offense charged in this case); 2) understood the constitutional intent, if any, of the Rule's drafters; and 3) established arrest and bail procedures in direct contravention of the municipal judge's order (i.e. the Cash Bail Schedule). In other words, the decision of the panel majority requires City officials to determine whether a judicial order is, or may be held to be, constitutionally invalid.[5] This holding demands of municipal officials a level of constitutional knowledge and interpretation heretofore rejected by this and other courts. *See e.g. Davis v. Scherer*, 468 U.S. , 82 L.Ed. 2d 139 (1984); *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982), cert. den. 460 U.S. 1012 (1983).

In *Davis v. Scherer*, this Court held that officials sued under §1983 "do not lose their qualified immunity because their conduct violates some statutory or administrative provision." In the course of that decision, the Court observed that were the law otherwise:

> Officials would be required not only to know the applicable regulations, but to also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. *It is unfair and impracticable to require such an understanding of public officials generally.* (Emphasis added.)

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5 Circuit Judge Becker dissented, expressing the view that "[p]oliceman are not lawyers, and they have a right to rely on the considerable expertise and learning of state judges." Appendix A, page 17a.

82 L.Ed. 2d at 150, n. 13. While *Davis* dealt with individual immunity not available to the City,[6] the foregoing language certainly suggests that this Court does not demand, expect or even encourage municipal officials to make those independent constitutional determinations which the circuit panel would require of the City in this case. *Cf. Harlow v. Fitzgerald*, 437 U.S. 800, 818 (1982); *Pembaur v. Cincinnati*, *supra* at 4294 (Justice White concurring).

In *Saldana v. Garza*, *supra*, the Fifth Circuit was also concerned with the qualified immunity of individual police officers. However, the court made the following relevant observation:

> Police officers can be expected to have a modicum of knowledge regarding the fundamental rights of citizens. Lawlessness will not be allowed to prevade our constabularies. However...our judgment must be tempered with reason....Certainly we cannot expect our police officers to carry surveying equipment and a Dicennial Digest on patrol; they cannot be held to a title-searcher's knowledge of metes and bounds or a legal scholar's expertise in constitutional law.

Id. at 1165. Surely these observations apply with equal force in the case of the City which acts only through the conduct of its individual officials. In other words, City officials -- police officers, mayor and councilmen alike -- should not be expected to become constitutional scholars. Nor are they "charged with predicting the future of constitutional law." *Pierson v. Ray*, 368 U.S. 547, 557 (1967). To the extent that the ruling of the Third Circuit in this case is to the contrary, review by this Court is required.

The Missing Link

It is elementary that imposition of liability upon the City under §1983 requires the existence of a causal link between the City's policy or custom and the injury alleged. *Monell v. New*

[6] *See Owen v. City of Independence*, 445 U.S. 622 (1980).

York City Department of Social Services, supra. This requires evidence establishing an "affirmative link" between the injury and "the adoption of any plan or policy" by the City. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976.)

Even assuming *arguendo* that the conduct of City employees in this case was unconstitutional and resulted from the execution of a policy attributable to the City, there was no evidence adduced at trial which linked that policy (i.e. the Cash Bail Schedule) to plaintiffs' injuries. Plaintiffs testified only as to the "single incident" resulting in their arrests. *Oklahoma City v. Tuttle*, 471 U.S. , 85 L.Ed. 2d 791, 804 (1985). The only evidence of a City policy was the undated Cash Bail Schedule issued by order of a municipal judge who was *not* the judge before whom plaintiffs were arraigned. (Ja572). There was *no* testimony or other evidence presented which linked plaintiffs' arrest with that single document or any other policy or practice of the City. As a result, the district court properly held that the Cash Bail Schedule, without more, could not serve "as an adequate predicate from which one could infer that it represented an established policy and practice of the City of Wildwood." Appendix C, page 32a.

The circuit court panel's unsupported conclusion that the City engaged in a "routine" practice of unconstitutional pre-arraignment detention ignores fundamental tort principles of causation, conflicts with decisions in other Circuits and is directly contrary to the clear teachings of *Monell* and *Pembaur*. Such far-reaching precedent must not be allowed to remain unchecked.

POINT II

CERTIORARI SHOULD BE GRANTED TO AVOID THE ESTABLISHMENT OF DANGEROUS PRECEDENT IN MATTERS OF NATIONAL IMPORTANCE.

Compliance With Judicial Orders

The majority of the circuit court panel held that police officers and other City officials should have ignored a municipal court order which established bail procedures. This ruling, essentially requiring police officers and other municipal officials to become constitutional scholars, offends not only established law and sound policy, but common sense as well. Indeed, the logical consequence of the panel's holding would be chaos in the law enforcement area.

More to the point, however, is the troubling matter of how municipal officials can be expected to predict the constitutional validity of judicial orders if the courts themselves are in disagreement. In this case alone this issue has been reviewed three times with conflicting conclusions. As to the import of the New Jersey Court Rules, the district court held that "the municipal judge, via his bail policy, in effect took away any discretion the City might have had." Appendix D, page 50a. Then, contrary to the panel majority decision that "[p]rivate citizens are presumed to know the law....," Appendix A, page 9a, the dissenting opinion expressed the view that policemen "have the right to rely on ... state judges." Appendix A, page 17a. Finally, while not specifically addressing this issue, four members of the Circuit disagreed with the panel opinion in sufficient respect to dissent from the denial of rehearing in banc. In addition, as noted above, the majority panel decision sharply conflicts with the eminently rational dicta in decisions of this Court and other Circuits. This case stands squarely in the center of this dilemma and provides no guidance whatsoever - indeed, compounds the confusion - for municipal officials who sincerely desire to conduct themselves in a rational and lawful manner.

Finally, the circuit ruling on this issue flies in the face of generally accepted practices (i.e. obeying judicial orders) which form the basis of an ordered society. Such a fundamental deviation from conduct heretofore expected and encouraged requires this Court's review.

The Conditions Of Confinement

The Circuit Court of Appeals held that the conditions of the plaintiffs' pre-arraignment detention (i.e. 12 hours, three to a cell without water, food or mattresses) were unconstitutional as a matter of law. This conclusion was reached despite the fact that there was no consideration of or inquiry into any "legitimate interest" of the City in detaining plaintiffs in these circumstances. *Bell v. Wolfish, supra* at 540.

In *Bell*, this Court held that the constitutionality of conditions of pre-trial detention rests upon a determination of whether those conditions amount to "punishment of the detainee." *Id.* at 535. This standard was applied by the district court when it ruled that the conditions of confinement in this case were not unconstitutional. Appendix E, page 56a. Circuit Judge Adams in his dissent to the denial of petition for rehearing agreed with this conclusion when he wrote that: "It is regrettable that plaintiffs experienced eleven hours of unpleasant confinement. But in a complicated society, it is not practical to construct a legal remedy for every perceived harm." Appendix B, page 24a. At the very least, in the view of Judge Adams, the existence of relevant facts in dispute precluded the conclusion that the record established a constitutional deprivation as a matter of law. Appendix B, page 22a. Indeed, the Third Circuit Court of Appeals itself has held constitutional pre-trial confinement conditions that were far more egregious than those complained of in the instant case. *See Union County Jail Inmates v. Di Buono*, 713 F.2d 984 (3d Cir. 1983), cert. den. 465 U.S. 1102 (1984).

In view of the evident confusion concerning the standards for pre-trial confinement established in *Bell v. Wolfish, supra*, and this Court's affirmation of the limited role that courts should

play in the administration of detention facilities, *Block v. Rutherford*, 468 U.S. , 82 L.Ed. 2d 438, 446 (1984), certification by this Court is appropriate. Review is particularly appropriate in this area where local governments throughout the country necessarily look to this Court for direction in establishing local detention policies and practices. The enormous cost to local governments of defending law suits such as the one at bar emphasizes the need for clear guidance on such matters which are part of the common and routine responsibilities of local officials.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

By: s/A.M.W.
ALAN M. WALLACK

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Brener, Wallack & Hill

Date: September 17, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5455

ANTOINETTE CONNIE ANELA, et al.

v.

CITY OF WILDWOOD, et al.
(D.C. Civil No. 83-1094)

MAUREEN McDONNELL COLE, et al.

v.

CITY OF WILDWOOD, et al.
(D.C. Civil No. 83-2444)

ROXANN COX COLE

v.

CITY OF WILDWOOD, et al.
(D.C. Civil No. 83-2525)

Antoinette Connie Anela, Angela DiPietro,
Maureen McDonnell, Lisa Tortis Cole,
Gina Bucceri and Roxann Cox Cole,
Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6)
March 6, 1986
Before: GIBBONS, BECKER and ROSENN,
Circuit Judges
(Opinion Filed: MAY 22, 1986)

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OPINION OF THE COURT

ROSENN, *Circuit Judge*.

The six appellants in this case are young women who brought a Civil Rights Act lawsuit under 42 U.S.C. § 1983 (1982) against the City of Wildwood, its chief of police, and several employees of that City's police

department as a result of their arrest and detention for violating the City's anti-noise ordinance. The arrest occurred at about 11:15 P.M. on July 3, 1981, and the plaintiffs were detained in holding cells in the police station until their hearing at 11:00 the next morning. Their complaint raised a number of federal constitutional claims. The trial court dismissed several counts prior to trial, and at the close of their case granted the defendants' Federal Rule of Civil Procedure 50 motion for a directed verdict. The plaintiffs moved for a new trial, and when that motion was denied, they appealed. We affirm in part, reverse in part, and remand for further proceedings.

I.

In the summer of 1981, the plaintiffs and four other persons leased a portion of a house in Wildwood. On July 3, 1981, at about 11:15 P.M., three police officers of the City of Wildwood entered the leased premises, placed the six plaintiffs and four others under arrest for loud radio playing, and carted them off to the police station. Nine of the ten persons detained were young females, ranging in ages from 17 to 20 years; they were placed in three cells, three persons to a cell. The one male who had been arrested provided the sum of $200 in cash and was released. He returned later with about $700 in an unsuccessful attempt to obtain the release of the others on bail. The female arrestees, including the plaintiffs, were held in the cells until 11:00 the following morning.

Plaintiffs filed three section 1983 suits in the United States District Court for the District of New Jersey, which were consolidated by order of the court. They alleged that the length and condition of their confinement violated their fourteenth amendment rights, that the release of the one male arrestee on bail violated their rights to equal protection, and that their

arrest without probable cause violated the fourth and fourteenth amendments. They also alleged various pendent state tort claims.

Through a series of summary judgment orders, the court dismissed various claims, including the due process claim based on jail conditions. The court dismissed all claims against the City of Wildwood except for the due process claim based on the length of the plaintiffs' detention. It dismissed this claim as to the individual defendants on the ground that they enjoyed qualified immunity as officials exercising discretionary functions.

Thereafter, the case went to trial on two issues: the due process claim against the City based on the length of detention and the equal protection claim against the individual defendants. When the plaintiffs rested, the City moved under Rule 50 for a directed verdict on the ground that plaintiffs had presented no evidence establishing a "policy and practice" on the part of the City resulting in the violation of plaintiffs' constitutional rights. The individual defendants also moved for a directed verdict on the grounds of insufficient evidence because the plaintiffs had not specifically identified the individuals who booked them and locked them up.

Plaintiffs' counsel then moved to reopen plaintiffs' case to permit the introduction of certain exhibits and testimony. The court did not allow the testimony, but admitted three exhibits. Two exhibits were duty rosters showing which employees of the police department were on duty during the two shifts covering the period of incarceration and the third was a bail schedule issued by a judge of the municipal court of the City of Wildwood. The court received the exhibits in evidence and considered them in ruling on the directed verdict motions. The plaintiffs made no offer of proof that any testimony would be proffered which went beyond the facts shown on the exhibits.

On appeal the plaintiffs contend, *inter alia*, that the City should be liable because they were held overnight on a charge of violating an ordinance instead of being released subject to a summons as provided by New Jersey law. They also assert that because a male who was arrested with them was given the opportunity to post bail and was released immediately, their rights to equal protection under the fourteenth amendment were infringed. As to their fourth amendment count alleging their arrest without probable cause, they claim that the district court erred in ruling that their guilty pleas in municipal court to a violation of the city ordinance collaterally estopped them from raising the issue. Finally, the plaintiffs contend that the district court erred in holding that the conditions of the holding cells in which the plaintifs were confined did not violate their personal liberty rights protected by the fourteenth amendment.[1]

II.

We first turn to the issue of detention. Wildwood attempted to justify the detention of the plaintiffs on the basis of a bail policy statement prepared by the Judge of the Municipal Court of Woodbridge Township. The trial court ruled that the Judge of the Municipal Court, in judicially adopting a bail policy, acted independently of the township's governing body. *See Kagan v. Caroselli*, 30 N.J. 371, 377, 153 A.2d 17 (1959). In rejecting plaintiffs' motion for reconsideration of the order denying a new trial, the district court held that the plaintiffs had not proven that the allegedly illegal bail policy was one emanating

1. The plaintiffs also contend that the district court abused its discretion by denying their motions to reopen. Because the plaintiffs made no offer of proof in support of their motion that additional testimony would be proffered which went beyond the facts shown on the duty roster exhibits, we see no merit to the contention and reject it.

from the City. The court concluded that the policy was not the City's but was the State's "per the Municipal Court Judge."

In *Monell v. New York City. Department of Social Services*. 436 U.S. 658 (1978). the Supreme Court stated that a municipality cannot be held liable "*solely* because it employs a tortfeasor -- or. in other words. a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id*. at 691 (emphasis in original). Instead. the Court held. "it is when execution of a government's policy or custom . . . inflicts the injury that the Government as an entity is responsible under § 1983." *Id*. at 694. The plaintiffs were therefore required to establish either (1) the existence of an officially promulgated authority. or (2) that the practices of city officials causing the alleged deprivation were "so permanent and well-settled" as to have the "force of law." *Id*. at 691.

The New Jersey Supreme Court. pursuant to the authority of the New Jersey Constitution. promulgated Rule 3:4-1(b). Rules Governing Criminal Practice (1985). which has the force of law in the area of court procedure. *See George Siegler Co. v. Norton*. 8 N.J. 374. 86 A.2d 8. 12 (1952). The Rule requires a person making an arrest without a warrant to take the arrested person to the nearest committing judge and file a complaint forthwith. and either issue a warrant thereon or. if the person taking the complaint has reason to believe that the defendant will appear in response to a summons. cause a summons to issue. The Rule further provides that when minor offenses are charged. the officers in charge of the police station shall. after completion of the post-arrest identification procedures required by law. "issue a summons to [the arrestee] and release him in lieu of continued detention unless he determines that any of the conditions set forth in subparagraph (c)" apply. in which event the

officer in charge shall have the discretion not to issue a summons. Rule 3:4-1(b).[2]

None of the conditions of Rule 3:4-1(c), permitting the stationhouse chief in his discretion to forego issuing a summons after all post-arrest procedures were complete, applied here. No violence, drugs, or alcohol was involved. These defendants were arrested for the minor non-indictable offense of playing their radio loudly in their own home.

Wildwood contended, however, that New Jersey Rule 3:4-1 is irrelevant because the procedure under which they routinely detained persons overnight for minor offenses without issuing a summons was mandated by the "Cash Bail Schedule" established on order of the Wildwood municipal judge. The district court reasoned that compliance with the bail schedule

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2 Subparagraph (c) provides

(c) The officer in charge of the stationhouse shall have the discretion not to issue a summons to an arrested person when any of the following conditions exists

(1) The person has previously failed to respond to a summons.

(2) The officer has reason to believe that the person is dangerous to himself, to others or to property.

(3) There is one or more outstanding arrest warrants for the person.

(4) The prosecution of the offense or offenses for which the person is arrested or the prosecution of any other offense or offenses would be jeopardized by immediate release of the person.

(5) The person cannot provide satisfactory evidence of personal identification.

(6) The officer has reason to believe the person will not appear in response to a summons, or

(7) The person demands to be taken before a judge.

could not amount to official municipal policy because "the municipal courts of the State of New Jersey and the rules controlling them are promulgated by the New Jersey Supreme Court and are not within the control . . . of the municipal authorities." The district court also noted in its decision rejecting plaintiffs' motion for reconsideration of the order denying a new trial, "nothing in the New Jersey Court rules mandated that the City pursue a contrary policy."

Yet, Rule 3:4-1 specifically and unequivocally required the City to pursue a contrary policy. It applied statewide, provided carefully drafted procedures to protect the legal rights of arrestees, and therefore imposed a duty upon Wildwood to issue summonses to these plaintiffs after the completion of the post-identification procedures, rather than to confine them in cells overnight. Accordingly, the City of Wildwood's routine noncompliance with the controlling Rule 3:4-1 "could be ascribed to municipal decisionmakers." *City of Oklahoma City v. Tuttle*, 53 U.S.L.W. 4639, 4642 (U.S. June 3, 1985), and amounted to a "policy" under *Monell* for purposes of section 1983 liability.

The Supreme Court has not fully developed the meaning of "policy" in this context, but it is sufficient that the wrong results from a practice -- not an isolated act -- that is attributable to a municipal policy maker. *See City of Oklahoma City*, 53 U.S.L.W. at 4642. The offending practice need not have the city's formal approval. *Monell*, 436 U.S. at 691. In this case, the City engaged in an offending practice: it acknowledges that it routinely followed the repugnant bail schedule and ignored Rule 3:4-1 when booking arrestees. This blatant and routine disregard by the city police of an applicable legal procedure designed to preserve the right of citizens detained in their custody amounts to a "policy" as construed by *Monell*. At the very least, it

amounts to a practice "so permanent and well settled" as to have "the force of law" and is ascribable to the municipal decisionmakers. *Id.*[3]

The issuance of a bail schedule by the municipal court does not excuse City officials from complying with the New Jersey Supreme Court's rule. Private citizens are presumed to know the law, and no less should be expected of public officials when they detain and confine persons. *See North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1924) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them . . . ."). The City established a practice contrary to Rule 3:4-1 and must bear responsibility therefor.[4] It was therefore error to direct a verdict in favor of the City on this issue.

III.

The fundament for plaintiffs' denial of equal protection claim is the grant of bail to the only male

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3. "A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state 'custom or usage.'" Pembaur v. City of Cincinnati, 54 U.S.L.W. 4289, 4293 n.10 (U.S. March 25, 1986).

4. The court entered summary judgment for the city police officers on the ground of qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982). The dissent apparently would also relieve the City from potential liability because "there is no evidence that the Wildwood police or any other Wildwood employee knew that the Municipal Judge's bail schedule was invalid." Dissent at 3. Liability of the City, however, is not predicated upon the single act of detention by the police officers but upon a settled practice or policy of the City's decisionmakers to confine arrestees charged with minor non-indictable offenses without regard to the City's duty to issue summonses after completion of post-identification procedures. When a municipality engages in a practice of confining such arrestees without issuing summonses, it should correctly inform itself of its legal duty to them.

defendant arrested and the denial of bail to the females. This contention of the plaintiffs does not require any extensive discussion despite the alleged gender discrimination.

The district court dismissed the equal protection claim solely on the basis that there was insufficient evidence to identify the specific police officers responsible for detaining and confining those plaintiffs. The police log sheets admitted into evidence in response to plaintiffs' motion to reopen the case did not indicate which officers actually dealt with the plaintiffs. Plaintiffs in section 1983 suits must identify defendants with greater specificity than plaintiffs provided here.

In *Rizzo v. Goode*, 423 U.S. 362 (1976), plaintiffs alleged civil rights abuses by the Philadelphia police. They named defendants who had not personally committed any abuses or been responsible for policies causing them. The Supreme Court held that such defendants could not be held liable under section 1983 merely because they were members of a group of which some other members were guilty of abuses. *Id.* at 370-71. Similarly, the court in *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982), held that a county sheriff was not per se liable for violations of a plaintiff's constitutional rights merely because the plaintiff was in a jail for which he was responsible. Without evidence of the sheriff's participation in the events of the prisoner's detention, "[h]e cannot be held liable vicariously under § 1983 for any conduct of his subordinates. Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977). Neither could he be held liable on the basis of a failure adequately to supervise or control any conduct that directly caused the specific deprivation charged." Id. at 1142-43.

In the instant case, the evidence at most establishes that the six individual defendants, among

others, were on duty during the shifts in question. The evidence establishes that Officers Mitchell and Robinson, the arresting officers, did not participate in booking the plaintiffs. Two defendants were civilian dispatchers, and no evidence suggests that the dispatchers had any duties with respect to booking and detention. There is evidence that the other individual defendants were on duty, but no evidence as to where or in what capacity. Looking at the evidence of record in the light most favorable to the plaintiffs, we conclude that the trial court properly granted the motion for a directed verdict in favor of the individual defendants.

IV.

In their complaint, plaintiffs asserted that they were arrested without probable cause in violation of their fourth amendment rights. They identified the arresting officers as Mitchell and Robinson. In an interlocutory order, the district court dismissed this claim on the ground that plaintiffs had pled guilty in the city municipal court on the morning after their overnight detention. The guilty plea, the court held, "far more than an adjudicated conviction . . . is a conclusive admission that one committed the crime charged and, therefore, that probable cause for arrest existed." The court, however, perceived at once that a guilty plea may not be conclusive for it qualified its statement: "While, of course, one may plead guilty for reasons of convenience rather than guilt, by so doing one necessarily imperils his right to later claim innocence."

The district court correctly ruled that defendants in a section 1983 suit can raise the issue of collateral estoppel where the plaintiffs attempted to relitigate in federal court issues decided against them in state criminal proceedings. *See Allen v. McCurry*, 449 U.S.

90, 101 (1980). This does not end the matter, however. The federal court, in determining the collateral estoppel effect of a state court proceeding, should apply the law of the state where the criminal proceeding took place and also ascertain whether the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue decided in the state court. *See Bouer v. O'Hara*, 759 F.2d 1117, 1124 (3d Cir. 1985).

In *Matter of Tanelli*, 194 N.J. Super. 492, 477 A.2d 394, *certif. denied*, 99 N.J. 181, 491 A.2d 686 (1984), the New Jersey Superior Court noted that under New Jersey law the doctrine of collateral estoppel could be applied in a civil proceeding where the facts at issue had been litigated in a prior criminal conviction for an indictable offense, but a conviction for a non-indictable offense could not be so used. "To be sure, in many cases inconsequential non-indictable offenses are adjudicated informally by a plea of guilty or a brief trial in the municipal court. In such a case collateral estoppel would not be applied." *Id.* at 397. The ruling of the court in *Tanelli* is consistent with this court's interpretation of the Restatement (Second) of Judgments which does not give collateral estoppel effect to guilty pleas, but requires that the issue be "*actually* litigated and determined by a valid and final judgment." *Bouer v. O'Hara*, 759 F.2d at 1126 (emphasis in original) (citing Restatement (Second) of Judgments § 27 (1982)).

Because the plaintiffs' pleas of guilty in this case were to a non-indictable offense where the fourth amendment issues of fact were never subjected to an adversary contest leading to a judicial determination, it was error to hold that under New Jersey law the plaintiffs were estopped from raising their fourth amendment claims in the federal civil litigation.

V.

The district court also held that the conditions of the plaintiffs' confinement did not amount to punishment and therefore did not violate their rights. The fourteenth amendment protects pre-trial detainees from punishment prior to a determination of guilt. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Conditions of incarceration that are harsh, arbitrary, and unrelated to a legitimate governmental objective constitute punishment, *id.* at 538, as does compelling detainees to "endure genuine privations and hardship over an extended period of time . . . ." *Id.* at 542. Courts have held conditions superior to those in the instant case to be unconstitutional for pre-trial detainees. In *LaReau v. Manson*, 651 F.2d 96 (2d Cir. 1981), the court held that requiring prisoners to sleep on mattresses on the floor constituted punishment "without regard to the number of days for which a prisoner is so confined." *Id.* at 105. In *Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 996-97 (3d Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984), this court commented that the "unsanitary and humiliating" practice of forcing detainees to sleep on mattresses on the floor does not pass constitutional muster.

In the instant case, non-disruptive, non-violent, non-alcoholic young women, without any behavioral problems except for the allegation of participating in loud radio playing in their home, were confined in jail cells through the night until almost noon of the next day without drinking water, food, or sleeping facilities. The situation might have had more serious results had one of them required food or water because of some pre-existing medical condition. Nonetheless, the evidence supports their position that the conditions imposed upon them constituted privation and punishment in violation of the fourteenth amendment.

We conclude that the City of Wildwood may be held liable under *Monell* for the conditions of plaintiffs' confinement. Even if the practices with respect to jail conditions also were followed without formal city action, it appears that they were the norm. The description of the cells revealed a long-standing condition that had become an acceptable standard and practice for the City. The City offered no evidence rebutting the absence of beds or even mattresses, or its failure to provide food or drinking water. Under the circumstances, these detention conditions constituted a City custom or usage "even though such a custom has not received formal approval through the body's official decision making channels." *Monell*, 436 U.S. at 691. We therefore hold that the district court also erred in ordering summary judgment for the City on this issue.

VI.

In sum, the district court properly denied plaintiffs' motion to reopen the case for additional testimony and committed no error in granting the motion for a directed verdict in favor of the individual defendants on plaintiffs' denial of equal protection claim. The court, however, erred in dismissing plaintiffs' fourth amendment claims on the ground of collateral estoppel.

We hold that the practice of the police officers of the City of Wildwood in routinely following a bail schedule established by the City municipal judge in violation of a rule of the New Jersey Supreme Court designed to preserve the right of citizens detained in their custody is attributable to the City. The district court therefore erred in directing a verdict in favor of the City of Wildwood on this issue. Finally, we conclude that it was error to enter summary judgment for the City on the conditions of the plaintiffs' confinement.

Accordingly, the judgment in favor of the individual defendants on the equal protection claim will be affirmed. The judgment in favor of the City of Wildwood will be reversed and the case remanded for further proceedings consistent with this opinion.

The costs of the individual appellees will be taxed to the appellants. Two-thirds of the appellants' costs will be taxed to the City of Wildwood.

BECKER, *Circuit Judge*, dissenting in part.

I concur in parts III, IV, and V of the majority's opinion. I dissent from part II, however, because I do not believe that either the bail schedule promulgated by a Municipal Judge who was part of the New Jersey judicial system or the township's decision to follow that schedule can be deemed a municipal policy under *Monell v. New York City, Department of Social Services*, 436 U.S. 658 (1978).

Under *Monell*, a municipality cannot be held liable for the constitutional torts of its employees unless the plaintiffs can establish that the alleged constitutional violation was either (1) part of an officially promulgated policy, or (2) a practice of city officials "so permanent and well-settled" as to have the "force of law." 436 U.S. at 691. In this case, the Wildwood police detained the plaintiffs pursuant to a bail schedule that authorized routine overnight detention for minor offenses without the issuance of a summons. This schedule was established by order of a Wildwood Municipal Judge. The district court held that, because the Municipal Judge was not a part of the municipal government, but rather a part of the state court system, the bail schedule could not be considered a policy of the City of Wildwood: "the municipal courts of the State of New Jersey and the rules controlling them are promulgated by the New Jersey Supreme Court and are not within

the control or variation . . . of the municipal authorities." Joint App. at 321. The district court therefore found that the City of Wildwood could not be held liable under *Monell*. I agree.

The majority apparently accepts the district court's view that, because the Municipal Judge is not a city employee, his promulgation of the bail schedule cannot be found to be a city policy or practice. The majority maintains, however, that the city's decision to follow the schedule was a policy that suffices for liability under *Monell*. Although a municipality's obedience to an order of a state court would not ordinarily be sufficient to support municipal liability, the majority holds that such obedience is enough in this case because the Municipal Judge's order was blatantly illegal. In support of its position, the majority points to Rule 3:4-1, Rules Governing Criminal Practice (1985), promulgated by the New Jersey Supreme Court, which requires that persons charged with minor offenses be released in lieu of continued detention, except under certain defined circumstances not applicable to the plaintiffs in this case. Observing that the Municipal Judge's bail schedule conflicts with this rule of the state Supreme Court, the majority concludes that the decision of the city police to follow the schedule was a "blatant and routine disregard . . . of an applicable procedure" that amounts to a policy under *Monell*. Maj. Op. at 18-19. According to the majority, the fact that the schedule was issued by the Municipal Court does not excuse city officials because they are presumed to know that Rule 3:4-1, and not the "repugnant bail schedule," is the law to be followed. *Id.* at 18.

I do not dispute the majority's finding that the Municipal Judge's bail schedule is invalid because it is in conflict with Rule 3:4-1.* Nor do I dispute the

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*. Indeed, were the judge not immune from liability, a suit might be properly maintained against him.

majority's conclusion that, if there had been no conflicting bail schedule, the city could be held liable for its failure to follow Rule 3:4-1. I dissent, however, because I believe that, regardless of the conflict between Rule 3:4-1 and the schedule, the City of Wildwood cannot be held responsible for obeying the order of a Municipal Judge, a fully competent state judicial official. Although it may be clear to this Court that the municipal court's schedule was invalid because it was in conflict with Supreme Court rules, it is unfair to require the Wildwood police to assess the constitutionality of the Municipal Judge's order or to discover the conflict between two state court rules.

Policemen are not lawyers, and they have a right to rely on the considerable expertise and learning of state judges. The Municipal Judge was presumably aware of Rule 3:4-1, and the Wildwood police might well have thought that he had a reason for believing that his order was valid notwithstanding the conflict with the Supreme Court rule. At any rate, there is no evidence that the Wildwood police or any other Wildwood employee knew that the Municipal Judge's bail schedule was invalid. In my view, the police should be entitled to follow the orders of a state court without first analyzing those orders to determine whether they are constitutionally sound. *Cf. Michigan v. DeFillippo*, 443 U.S. 31 (1979) ("Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.").

In sum, Wildwood acted in compliance with a bail schedule promulgated by a judge whose court "is an integral part of a state-wide judicial system" and who exercises the judicial power of the State of New Jersey. *Kagan v. Caroselli*, 30 N.J. 371, 377 (1959). It can therefore not be considered responsible for a policy so as to be subject to liability under *Monell*. I respectfully dissent.

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for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5455

ANTOINETTE CONNIE ANELA, et al.

v.

CITY OF WILDWOOD, et al.
(D.C. Civil No. 83-1094)

MAUREEN McDONNELL COLE, et al.

v.

CITY OF WILDWOOD, et al.
(D. C. Civil No. 83-2525)

Antoinette Connie Anela, Angela DiPietro,
Maureen McDonnell, Lisa Tortis Cole,
Gina Bucceri and Roxann Cox Cole,

Appellants

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*, ROSENN, *Senior Circuit Judge*

The petition for rehearing filed by appellee, City of Wildwood, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Hunter would grant petition for in banc rehearing.

By the Court.

/s/ John J. Gibbons

Judge

Dated: June 19, 1986

ADAMS, Circuit Judge, dissenting.

I respectfully dissent from the denial of appellees' petition for rehearing. In my view, there is serious question whether the panel is correct in holding that constitutional violations occurred and in concluding that liability for those violations may be imposed upon the City of Wildwood.

The six female plaintiffs in this action were arrested on charges of violating the City's antinoise ordinance by playing their radio too loudly. They were detained in police station holding cells from the time of their arrest, around 11:15 p.m., until their hearing before a municipal judge at approximately 11:00 a.m. the following morning. A male companion arrested with them was released the same night after paying $200 bail. It is alleged that the male arrestee returned later in an attempt to obtain the release of plaintiffs, although this fact is disputed. At their hearing,

plaintiffs entered guilty pleas to the charges against them, and were released.

Plaintiffs brought this action under 42 U.S.C. § 1983 (1982), claiming that they had been arrested without probable cause, that they were deprived of their rights under the equal protection clause since their male companion was released, and that their confinement violated the due process clause of the fourteenth amendment. After trial before a jury, the district court granted defendants' motion for a directed verdict. It observed that plaintiffs had failed to produce any evidence that their alleged constitutional deprivations were caused by a municipal policy or custom.

The panel, in reversing the grant of a directed verdict for defendants, does not merely hold that the trial judge erred in withdrawing the case from the jury. Rather, it goes further and concludes that the record establishes as a matter of law that plaintiffs' constitutional rights were violated and that these violations were caused by the execution of a policy or custom of the City of Wildwood. I cannot agree that such a holding is warranted on the record here.

Plaintiffs were detained for approximately eleven hours before being released. The panel concludes that this period of detention violated plaintiffs' rights under the due process clause of the fourteenth amendment. However, no authority is cited for this proposition, nor is there any explication provided for the theory under which the constitutional deprivation is found to have occurred.

The panel also concludes that the conditions of confinement were so harsh as to amount to punishment prior to the determination of guilt, within the meaning of *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). It cites this Court's opinion in *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir. 1983),

cert. denied, 465 U.S. 1102 (1984), as support for its holding. However, while *Union County* did state in dictum that requiring detainees to sleep on mattresses on cell floors could constitute unconstitutional punishment under the fourteenth amendment, its observations were expressly limited to the situation in which detainees were subjected to such conditions "for more than a few days." *Id.* at 994. The holding in *Union County* was that, with the implementation of some modifications, the prison conditions present there did not violate inmates' due process rights.

As the Supreme Court stated in *Bell*, "Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial." 441 U.S. at 540. And the Court emphasized in *Hutto v. Finney*, 437 U.S. 678, 686 (1978), that the duration of a period of confinement must be considered in determining whether imprisonment under certain conditions amounts to unconstitutional pretrial punishment. Here, plaintiffs were detained for less than one day. Further, it appears that there was conflicting evidence whether plaintiffs were forced to submit to certain of the challenged conditions, such as crowding, or whether they requested to be placed in cells with their companions. Where such relevant facts are in dispute, and in light of the fact-specific nature of the necessary inquiry under *Bell* and *Hutto*, there appears to be no justification for the conclusion that the record establishes a deprivation of due process as a matter of law.

Finally, and most importantly, I believe that the imposition of liability upon the City of Wildwood for the alleged hardships suffered by plaintiffs is based upon a misinterpretation of *Monell v. New York City*

Department of Social Services, 434 U.S. 658 (1978). The majority opinion concludes that the City's "routine noncompliance with the controlling [New Jersey Court] Rule 3:4-1" constituted a municipal policy or custom under *Monell*, which is ascribable to municipal policymakers. Slip op. at 8. However, whether the individual defendants' actions in detaining plaintiffs violated a state court rule is an entirely separate question from whether those actions were taken in execution of a policy deliberately adopted by a municipal decisionmaker with final authority over bail procedures. *See Pembauer v. City of Cincinnati*, 54 U.S.L.W. 4289, 4293 & n.11 (U.S. Mar. 25, 1986). The majority opinion points to no evidence that would support a finding that plaintiffs were detained pursuant to a policy or established custom of the City of Wildwood. Indeed, it appears that the only evidence submitted by plaintiffs on the issue whether a municipal bail policy existed was a "Cash Bail Schedule" promulgated by a state court judge. The imposition of municipal liability based upon this single document is in direct contradiction to the Supreme Court's teachings in *Monell* and its subsequent opinions interpreting *Monell*.

The Supreme Court has stated that a city may not be held liable for the unconstitutional acts of its employees under a respondeat superior theory, but rather that, in order to impose municipal liability, there must be a showing that municipal policymakers were in some way at fault. *Monell*, 436 U.S. at 690-95. I disagree that plaintiffs here established a violation of their constitutional rights by city employees. Nonetheless, even if they did, the majority's opinion holding the City of Wildwood liable for any such constitutional deprivations seems to be nothing more than the imposition of liability on a respondeat superior basis.

It is regrettable that plaintiffs experienced eleven hours of unpleasant confinement. But in a complicated society, it is not practical to construct a legal remedy for every perceived harm. And to impose the costs of remedies, in circumstances such as those here, on municipalities that already have considerable difficulty in discharging their many responsibilities seems at least questionable. For all these reasons, I would grant the petition for rehearing.

Circuit Judges WEIS and GARTH join in this statement.

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for the Third Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

- -

Antoinette Connie Anela, Angela DiPietro, Maureen McDonnell, Lisa Tortis Cole, Gina Bucceri and Roxann Cox Cole,
Plaintiffs,

Civil Nos. 83-1094 83-2444 83-2525

v.

The City of Wildwood, et al.,
Defendants.

- -

UNITED STATES COURT HOUSE
401 MARKET STREET
CAMDEN, NEW JERSEY 08101
May 7, 1985

BEFORE: HONORABLE JOHN F. GERRY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Greenberg, Kelley & Prior
BY: James F. Schwerin, Esquire
Attorneys for the Plaintiffs

Brener, Wallack & Hill
BY: Gerard H. Hanson, Esquire
For Defendant City of Wildwood

Wilson, Elser, Edelman,
Moskowitz & Dicker
BY: Keith G. Von Glahn, Esquire
For Defendants Michael Nicely,
Gary Sicilia and William Celinski

Louis Hornstein, Esquire
BY: Eric Smith, Esquire
For Defendants William C. Mitchell
and Anthony Robinson

Raymond A. Batten, Esquire
For Defendant Ralph Sheets

THEODORE M. FORMAROLI, C.S.R.

THE COURT: All right, thank you.

Motions have been directed to the court under Rule 50 for directed verdicts in favor of each of the defendants by virtue of the arguments advanced in each instance now upon the record by defense counsel, and are opposed by plaintiffs' counsel for the various reasons that he discussed.

It seems to me abundantly clear that taking the plaintiffs' evidence in its totality, the record in this case, the evidence in this case, which under normal circumstances the court is restricted in its consideration of these motions, that the motions of all defendants must be granted.

There is no evidence whatsoever -- and before I allude to the evidence, the court is, of course, perfectly cognizant, as I'm sure counsel are, that at this posture the court is required not to indulge itself in the functions of credibility which are reserved solely to the jury; that all evidence of the plaintiff must be looked upon in its most favorable light and those inferences must be drawn, even though in conflict within the evidence, the body of the plaintiff's evidence, which are most favorable to the plaintiff in surviving these motions, and the court does so, and is conscious, of course, of its duty to do so. There is no evidence whatsoever that I can recall from which a rational jury could find, and this I take it is the standard, rational jury could find from the evidence perceived in this favorable light from which they could conclude that the plaintiff had sustained their burden of proving the liability of the involved defendants by a preponderance of the evidence.

So far as the arresting officers are concerned, I think that's the most obvious one. There is no evidence whatsoever of the involvement of these officers. They were never seen again except with the one single exception of one of the officers having gotten a glass of water for one of the plaintiffs at the station. But they were specifically excluded by the testimony of each plaintiff in the form of their acknowledgement that neither of the arresting officers was the uniformed male officer who denied bail to -- what was that young lady's name? We'll be back to her. Donna Pospieck.

MR. VON GLAHN: Yes, Judge.

THE COURT: So, it would be pure speculation on the part of the jury as to their involvement either in the critical areas of denial of bail in violation of equal protection, or the argued unreasonable length and duration of the liberty of the plaintiffs and the delay in, arguably, the delay involved in taking these plaintiffs before the local judicial officer. So I think clearly those defendants are out.

In the plaintiff's case, no one has identified, and there is otherwise no evidence, of the presence of any of these officers in the police headquarters during the critical periods of time. No evidence whatsoever. Purely speculation. We would ask of the jury, and certainly impermissibly, to find from such testimony that these defendants -- incidentally, the court will take judicial notice of the fact that these defendants were seen and observable by the plaintiffs during the jury selection process, with the single exception or two that were mentioned earlier, and quite fairly, and I think candidly, failed to identify or did not, giving them credit, did not identify any of these defendants as the officer who had denied bail. I'm excluding for the moment the suggested role of someone else to whom he repaired before making that decision.

So, there is no evidence about the involvement of the defendants represented by Mr. Von Glahn, two of whom are dispatchers.

MR. VON GLAHN: Yes, sir.

THE COURT: And there is no evidence either as to Mr. Nicely. This would appear to apply equally to Lt. Sheets. We don't know where he was, or what role he played, and he also was not identified by any of the plaintiffs, though sitting in court, as were the other defendants during the course of their testimony, as a role player in any respect in either the denial of bail or their retention in the headquarters until 11 o'clock or so the following morning. So, the proofs are woefully, woefully inadequate.

There is similarly nothing to hold the City of Wildwood in, not the slightest suggestion of proofs, which would be the burden of the plaintiffs, of course, in order to visit liability under the applicable law upon a municipal government, that the incarceration, though arguably unconstitutional, as plaintiff would argue, that it was done pursuant to any policy or practice of the city. We have heard no evidence at all of policy or practice of the city. These young ladies, presumably, had never been in this situation before and were not in a position to testify and did not testify as to any policy or practice of the city regarding unequal protection in the form of discriminatory access to bail on the basis of sex or the unreasonable holding, or so it would be argued by plaintiffs, of the plaintiffs until 11 o'clock the following morning. So out the city goes as well. So the motions must be granted on the basis of the record.

Now, then, we reach the more ticklish question of, well, for the reasons indicated, should the court exercise its discretion to open up the evidence again and permit the introduction into evidence of C-1, C-2 and C-3, and, as we now I think commonly recognize, to also open up the live testimony needed to authenticate these records and to establish their relevance to the time period and to the conduct as it has otherwise been established by the plaintiffs' own testimony? Where does it end? Where will it end? And how helpful will it be to best secure a fair result in this matter?

Well, we have to wonder about that.

MR. SCHWERIN: Your Honor, if I may have leave to interrupt for just a minute.

THE COURT: You may not. I've given you full opportunity, have I not --

MR. SCHWERIN: Okay, your Honor, sorry.

THE COURT: -- and all counsel to argue this matter? And you were permitted additional opportunities.

MR. SCHWERIN: Yes, your Honor.

THE COURT: As counsel for the defense pointed out, or one of them, I also extended to you the courtesy of opening your case again before you rested to permit you to address additional questions in recalling one of our plaintiffs, or whoever it was. There must be some end to this consideration.

Now, with reference to these things. C-1 purports to be a Wildwood Police Department Daily Report Sheet. And looking at its face, other than the fact that it's dated Friday, July 3, 1981, and has a list of names under the different shifts for that date, 12 to 8 shift, 8 to 4 and so on, it doesn't, without supporting testimony, present much help, even if I admitted it over the opposition of defense counsel. I am told by plaintiffs' counsel that the words "house" written opposite two of the, what did we say, 11 names for that shift means that they were permanently assigned to headquarters on that date. And yet I notice that in the 8 to 4 shift, the next shift on the very same page, "headquarters" was spelled out -- I say spelled out, or abbreviated; I guess it's headquarters, "HGTS" -- in which three people are presumably assigned to headquarters. So I don't know whether "house" means headquarters, I don't know whether it means permanent assignment. I'm not at all sure that the court on such a motion may indulge the plaintiff to the extent of reading into a document something that is not otherwise explained except through the explanations of plaintiffs' counsel.

And what we have, even if it were accepted, seems to proliferate plaintiff's problems rather than to solve them. Whereas it might otherwise be argued that the jury's uncertainty to the point of speculation was involved in its inability from the evidence to identify which one of these three defendants denied the bail, or which two, if you follow the arguments of plaintiffs' counsel, denied the bail, we now have some 13 officers. Did I say 13? 11 officers. Yes, 11 officers who were working that shift. So, the degree of speculation as to who that officer was that denied the bail, who literally said no, and also the levels of inference that lead us, as plaintiffs would argue, that lead us to some other identified superior officer from whom plaintiffs would argue authority was sought during the absence, also

becomes more difficult.

I do recall testimony, and I don't think it was contradicted, by at least one of the plaintiffs who indicated that she believed that the same officer was the booking officer. Quite apart from that, even if there were two, I do recall one of the young ladies saying that in response to some question regarding the number of officers, that while she only recalled one booking officer, that there were other officers from time to time going in and out of the station. Any one of whom, presumably, could be the culprit here. How is a jury to decide without guessing, without indulging in impermissible speculation?

Plaintiffs' counsel argued at one point here that the court had really gotten the plaintiff over this problem in its ruling earlier in one of the many motions, pretrial motions for summary judgment. But at that point in time, the court denied the motion for summary judgment, perhaps on other reasons, but certainly for the reason that it did not wish to preclude the plaintiffs at the time of trial, having then the opportunity for a full and plenary introduction of proofs, deprive the plaintiffs of the opportunity at the trial to which they were entitled, to establish, and the court was not aware at that point in time they could not do so, that these defendants named constituted the only officers in the headquarters at the time of the offending acts. And so while the plaintiffs could not identify the particular offending officers, by reason of their restriction in number, someone within that number was responsible. And so perhaps together with the other evidence developed at the time of trial, the plaintiff would be able to survive a motion, send that issue to the jury, the jury then having to decide not whether or not one of the non-defendant officers had committed the offending acts, but which one of the defendants had committed the offending acts, the proofs then restricting any role playing at the time of trial to those named defendants. We wouldn't exclude the possibility that plaintiffs might be able to do so at the time of the trial.

If one looks at the record in this case, the evidence in this case, we don't even have the presence proved of any of the

defendants at the time of the offending acts. And if we accept the C-1 and C-2, we have 11 officers present, obviously, many of whom are not defendants in the case. And from this broad array, this jury is somehow, by some divine insight, to decide who were the offending officers and whether they were defendants or non-defendants who are not before this court.

So, I really don't see where the admission of C-1 and C-2 would be very helpful to the plaintiffs in curing what otherwise appears to be their terribly inadequate proofs, looked at, again even so, in their most favorable light.

Now, turning to C-3, which purports to be -- it calls itself Cash Bail Schedule, and I won't describe it again, I've taken everybody's time to give some little resume of it before. But it purports to be the order of the municipal Judge in the Municipal Court. Undated. For all the evidence shows, it was not applicable at the time. And even if it were applicable at the time to the introduction of proofs, so far as the City of Wildwood is concerned, I can't conceive of how the cash bail schedule, an order of a judge of the Municipal Court of Wildwood, without more could serve as an adequate predicate from which one could infer that it represented an established policy and practice of the City of Wildwood.

This court will take judicial notice sitting as a forum court in the State of New Jersey and applying New Jersey law in diversity cases on a routine basis, that the municipal courts of the State of New Jersey and the rules controlling them are promulgated by the New Jersey Supreme Court and are not within the control or variation, unless by their terms they permit it, of the municipal authorities. It's preposterous, it seems to me, to suggest that the Municipal Court or its promulgated orders, constitute an expression of the authority of the municipal corporation. It seems to me a complete disregard of the separation of functions, powers and authority. So, I don't see where the bail schedule, if it is sought to be proffered for the purposes of establishing a practice -- and I think Mr. Hanson was quite fair when he indicated to the court that the federal case authorities indicate that not only is the plaintiffs' burden

to prove policy and practice of the city, but that it must be so permanent and well-settled as to have the force of law. Not so here.

So, I wonder, in deciding whether fairness would require the opening up of these plaintiffs' proofs for the introduction of these documents and live testimony from one or more witnesses, I don't know the answer to that, in order to establish their authenticity and relevance and thus admissibility, I don't know whether that to do so would be helpful in the plaintiff avoiding that which is otherwise compelled by the paucity of its proofs without their consideration. I'm doubtful that it will make any difference at all.

I don't quite understand the heat of the battle argument when the joint final pretrial order asked the plaintiff to list their witnesses as to the specific issue, liability, and only the witnesses that were called were listed. And if I understand the arguments of one of the defense attorneys, at some point in time one of the officers' names who appears on the 12 to 8 shift for Friday, July the third -- excuse me, I got the wrong one. C-2 for Saturday, July the fourth, and Officer Voll, V-O-L-L, was identified by a deponent defendant officer as maybe the booking officer.

And it's quite true that the joint final pretrial order, as Mr. Schwerin points out, does indicate the intention of the plaintiffs to introduce at the time of trial certain documents as exhibits. They talk about defendant City of Wildwood's answers to interrogatories numbers 15 through 22. I have no idea whether those would have been helpful or not, or certain portions, identified portions of the transcript of the deposition of Harry Breslin. I gathered some objection was taken to that, he no longer being a party.

And then the plaintiff does set forth these daily logs, these two daily logs of July 3rd and July 4th, and the bail schedule that we've talked about. But, I looked over the stipulations thinking that perhaps these documents were stipulated into evidence. And I invite counsel to indicate to me to the contrary, but

reading the stipulated facts, they appear on page two and a portion of page three, I don't see anything in there about the fact that these documents or the contents of the documents were stipulated. It does not appear to be. They do not appear specifically to be within the corners of the stipulation of fact in this case, nor the contents thereof.

In reviewing just at this moment, once again, part roman numeral VII dealing with exhibits under plaintiffs' exhibits, there is a portion entitled defendants' objections to the introduction of plaintiffs' exhibits. And I gather from that which follows, that is the defendants' response, it seems to be a collective response. And I suppose all defendants would be held, that it is a collective response, who signed the joint final pretrial order, which was sigend by Mr. Hanson on behalf of all defendants. So all are bound by it. That defendants only object to item number two of those listed plaintiffs' intended exhibits. And item number two is the transcript of the deposition of Harry Breslin. So, apparently, in the joint final pretrial order it appears that the defendants collectively made no objection to the introduction of plaintiffs' exhibits, including C-1, C-2 and C-3.

Defense counsel wish to be heard on that?

MR. HANSON: Well, Judge, your statement is correct, the language appears for itself. We did not stipulate the documents into evidence by failing to object. There has to be a foundation for the documents. The documents have to mean something and they only mean something when testimony comes out of someone's mouth explaining what they are in and of themselves. We did not stipulate --

THE COURT: Well, presumably if the necessary supporting testimony to qualify them for admission into evidence is provided, your objections would not be critical or important. Presumably, the absence of objection to the introduction of one's adversary's exhibits means that you would not require that which would otherwise authorize their admission without your consent. What is it that you are not objecting to when the question is: Defendants' objections to the introduction of plaintiff's exhibits?

MR. HANSON: I am suggesting that there must be some foundation to explain what the documents are in and of themselves. Respectfully, I'm disagreeing with an interpretation of what the joint pretrial order is with the very court who mandates the order and I'm not in a very good position when I do so. But it is not my understanding and it wasn't my intention when I failed to object to these other exhibits that in essence I was stipulating them into evidence. If I had done so, I would have so provided in the portion of the pretrial order marked as stipulations. I can say, sir, that if witnesses were provided, as they should have been to lay the foundation for the exhibits, they may have gotten into evidence. I'm not certain they would have meant anything and it would depend upon what the foundation to put them in would have been. But absent a foundation, these documents mean nothing.

THE COURT: Well, I think that goes to the weight. You're arguing weight, not admissibility now, aren't you? Aren't you arguing that even if we had no objection to the admission into evidence of these exhibits at the time of trial, they still, to the extent that they do not explain themselves, are irrelevancies without explanatory independent testimony?

MR. HANSON: Well, there is an argument that comes before weight and that's foundation. And I suggest that that goes to admissibility.

THE COURT: That they are what they purport to be?

MR. HANSON: Well, they are what they purport to be, whatever that is, but until we have a foundation, we don't know what it is. To give those documents to a jury does nothing more than create mass speculation and confusion in their minds.

THE COURT: Well, why didn't you object at the time of the joint final pretrial order? That's the basis for objection, isn't it? They shouldn't go into evidence because they're irrelevant or because they are not what they purport to be, any number of objections, just as you raised a number of objections for all the reasons that you cited to the use of the deposition of Chief Breslin.

MR. VON GLAHN: I think plaintiff provided some insight to that, your Honor, by saying that we had no problem with tendering to the court xerox copies, duplicate originals. There is no objection as to the authenticity of the xerox duplicate original, but that does not waive any objection, I suggest, as to any of the other elements necessary by the moving party in this case, plaintiff, for getting those documents into evidence.

MR. SCHWERIN: Your Honor, may I just be heard on that copies issue? That was something that was only raised well after this pretrial order was signed. I subpoenaed the originals.

THE COURT: Oh, I don't think you even have to argue that, Mr. Schwerin.

MR. SCHWERIN: Thank you, your Honor.

THE COURT: It seems to me that anyone who has failed to object when invited, and indeed required to do so, to the introduction plaintiffs' exhibits at the very least cannot therefater claim that the documents are not authentic. Authentication certainly is waived, if nothing more.

Now what is you argument?

MR. VON GLAHN: That's all. Obviously, Judge, I was not yet into the case, although we are agreed to be bound. Mr. Murphy, formally of the office, had indicated to the court that he was in agreement with the pretrial order. But I think that the understanding among counsel with respect to the objection, that the only objection -- and if Mr. Schwerin can represent that his understanding is different than that, that the only objection that we were -- the only thing we weren't going to have him do was to bring in the custodian of records and say compare this with the original; if they're the same, fine. We weren't going to make him go through the administrative step. But we are not certainly giving up any obligation on the plaintiff moving party's part to connect it in. That's not as to weight or force and effect to be given to it, but as to the documents themselves.

MR. HANSON: Judge, if I may also, Judge, I might add that I was not -- I never received a copy of the subpoena to which Mr. Schwerin refers, nor did I ever receive a notice to produce documents come the time of trial. I did receive, however, a telephone call refering to the subpoena being served, at which point I made it very clear that while I would not object to a copy of an original document being admitted into evidence, I was not stipulating to the admissibility of any of the documents. It never was my intention, and I dare say Mr. Schwerin could not represent to the contrary that he understood that the nature of this joint pretrial order was such that we were stipulating these documents into evidence. A great deal of time was spent preparing this joint pretrial order, particularly as to the stipulations. If they were to go in, they would have gone in on the stipulations.

And I say, I have prepared many of these in this district and in this vicinage, and I have never considered, nor have any of the adversaries, and I'm not sure what Judge Simandle's position is on it, but I have for the first time candidly come into a situation where waiving an objection to a document, waiving a substantive objection to a document, which is what I say is rendered here, is tantamount to stipulating the other documents into evidence.

THE COURT: It says defendants' objections to the introduction of plaintiffs' exhibits. And when you, Mr. Hanson, raised objections to item two, I notice your objection didn't -- you didn't confine it just to authenticity. Of course, there you couldn't because it was, I suppose, a deposition that you are talking about. But you went into your objections as to relevancy, for example. You felt that relevancy, objections as to relevancy were necessarily stated apparently in response to this section.

MR. HANSON: I can't add anything more to what I've already said without going in circles. I will attempt to -- I will distinguish the difference between documents and deposition testimony. I was, in fairness, putting everyone on notice as to what I was going to say, which is typically the practice both

in federal court and in state court, so that when it comes time to read the depositions, the adversary and the court is aware of what is intended to be read from and what the opposition to that deposition testimony is so that a ruling can be made from the bench without having the need for the court to send the jury into the room so that time can be taken out at that point to study what the proponent of the deposition testimony seeks to read to the jury versus what the specific objections are.

THE COURT: C-1, C-2 and C-3 will be received in evidence over the objections of counsel, based on the joint final pretrial order.

Now, that having been done and the record will now, and I guess -- well, so that the record is not confused, they will maintain the C-1, C-2 and C-3 markings for identification, but they will now be received in evidence by the court.

(EXHBITS C-1, C-2 and C-3 WERE RECEIVED AND M.:.RKED IN EVIDENCE)

As I've indicated before, I don't think that this changes the picture, for all the reasons I've indicated. And I have invited counsel earlier to argue in the alternative, based upon the assumption that the request of plaintiffs' attorney will be denied, that is to reopen his case and introduce these documents and such additional supportng testimony as he perceives is necessary or helpful, and to argue in the alternative should the court do so. And I don't mean to -- I hope I haven't deprived anybody of arguments.

MR. SCHWERIN: I think the only one thing that really I don't think that maybe I could say fairly I had the opportunity to address before was your conclusion you announced regarding whether a municipal -- a policy at the municipal level could be established by the bail schedule set by the municipal Judge.

THE COURT: Yes.

MR. SCHWERIN: And I think that your Honor now having admitted the bail schedule into evidence, I would like at least

an opportunity to address that. It's already been addressed at some length in the trial briefs submitted to your Honor.

THE COURT: All right.

MR. SCHWERIN: And I submit that your Honor can take judicial notice of what the court rules of New Jersey were as of the relevant date, July 3, 1981, and the rule, I believe it's 3:4-3, it's in the brief, was on the books. And it said that for all but certain specified offenses -- and I think it's been conceded that none of those apply here -- you go to the police station, you get a summons and you are released unless, and there are six listed exceptions. If it doesn't fit into one of those, you are to be released as soon as you've been booked and given a summons. And I, therefore, say, and I think that the city has admitted in its answers to interrogatories with possibly one exception, the will non-application of all --

THE COURT: Now wait a minute; counsel.

MR. SCHWERIN: I'll retract that.

THE COURT: I'm hearing a new argument that you didn't advance before.

MR. SCHWERIN: I'll retract that, your Honor.

THE COURT: And now you are also suggesting, urging upon me answers to interrogatories. You know, the defendants answers to interrogatories, they are not evidential unless you put them in evidence.

MR. SCHWERIN: I understand, your Honor.

THE COURT: And you haven't done that, have you?

MR. SCHERWIN: I'll retract. I will just rely on the rule as it stands and I will --

THE COURT: What's the rule say?

MR. SCHWERIN: The rule says you go to the station for

all but a few serious offenses, and this is not one of them, and there are enumerated in the statute, just by reading the statute -- the rule, rather, it's clear that the violation of this noise ordinance is not one of them, you know, you should be taken, when there is an arrest without a warrant, which is what we had here --

MR. SMITH: Your Honor -- I'm sorry.

MR. SCHWERIN: You go to the station, you are issued a summons, and you are released unless, and there are six exceptions. And I will rely on the rule as it stands at this point, your Honor.

And I submit that that rule being promulgated by the Supreme Court of New Jersey is binding upon a municipality and a local Judge's rule, which says in all cases they either post bail or stay in jail, period. And I think that that bail schedule indicates that is directly contrary to a rule promulgated by the Supreme Court of New Jersey. And to say that the city is not to be held responsible for following the dicates of a municipal Judge clearly going agianst the ruling of the state Supreme Court is too narrow a construction and that the city can and ought to be held liable, that -- what is the policy? The policy is the usual, normal, set. And the cases define this, I think it is argued, the way of doing things. That bail schedule establishes that that was what always happened. You either posted bail --

THE COURT: Whoa, whoa, whoa, whoa.

MR. SCHWERIN: Well, I represent to your Honor, anyway.

THE COURT: No, you may not represent to me.

MR. SCHWERIN: All right.

THE COURT: You may not testify. Your case is closed. I've admitted the documents, but the documents don't say anything more than may reasonably be inferred by the finder of the fact.

MR. SCHWERIN: Well, I will argue --

THE COURT: The finder of the fact. And they say -- may I have the documents? The documents don't even say that the cash bail schedule applies during the period of time in question. You've introduced no evidence to show that it did.

MR. SCHWERIN: Well, at least let me complete putting my argument on the record, your Honor.

THE COURT: Oh, certainly.

MR. SCHWERIN: To simply say that a city can never be held liable for a policy because there was a municipal Judge's ruling in there I submit is erroneous in the circumstances here where you have a higher state court authority to the contrary. And that when faced with both of those, and the city certainly has to be charged with notice of the rules in effect as of July 3, 1981, and that rule I believe went into effect in September 1980, when there are two conflicting authorities from the judiciary in New Jersey, that they have the obligation to obey the higher authority, which is the Supreme Court in New Jersey and not the municipal Judge. If it was only his ruling and there was nothing else, then it might be a different story; but here we're not dealing with that vacuum, your Honor, we're dealing with the Supreme Court.

MR. HANSON: May I briefly, Judge?

THE COURT: Yes.

MR. HANSON: As to the federal 14th Amendment constitutional due process claim against the City of Wildwood, I reply by citing this court's opinion of, I believe, it's April 6, 1984 in response to the identical argument now presented by counsel for the plaintiff. I quote Judge Gerry:

"We note that a state's more stringent requirement of immediate release thereunder Rule 3:4-1 to which the court has already alluded, is irrelevant to our constitutional inquiry. State law may exceed constitutional minimums, but this fact does not serve to alter federal standards. *Fisher vs. Washington, M.T.A.*, 690 F.2d 1133 out of the Fourth Circuit. A violation of a state procedure more exactly than the federal constitutional requirements may only be redressed in a context other than Section 1983."

To that principle of law I add, as set forth in the briefs of the City of Wildwood, the relevant Municipal Court provisions were not out of Rule 3, but rather out of Rule 7. As I cite specifically, Rule 7:3-1 subsection A which reads: "The provisions of Rule 3:4-1", to which plaintiff refers, "are applicable to municipal and the county districts courts in respect to all non-indictable offenses except as follows: A summons" -- I'm sorry subsection B. "A summons may issue, may issue, in lieu of a warrant if the person taking the complaint has reason to believe that the defendant will appear."

Judge, I'm going to rest on my argument because I suggest that this is a situation where the law is the facts. The court, while generally the only body which may interpret and instruct the jury on the law, this is a situation where the rules of court must be in evidence either by way of request that the court take judicial notice of them, or actually placed into evidence as through the testimony of witnesses who indicated that they considered these particular rules of the New Jersey Supreme Court in reaching the decision to incarcerate the plaintiffs on the night in question. But as a principle of law, they have no relevance. This court has already decided that, and that is the law of this litigation.

MR. SCHWERIN: Your Honor, if I may. It is quite true that your Honor earlier dismissed the notion that a federal constitutional violation could be premised solely on violation of a state rule or statute. And I am not now arguing to the contrary. My understanding of what your Honor stated was that the city could not be held liable for the policy, even assuming the presence of a violation, the city could not be held responsible because we had not shown a policy. My argument now goes only to establishment of a policy. It does not, and I make no argument that that in and of itself would establish the constitutional violation, only that my understanding was we were stating that -- that there was nothing that the city could be held in on because of the policy issue. And I state that that state rule can be taken into consideration in terms of what the city's policy was. We get past that, there still has to be a showing of a constitutional violation which cannot arise solely from that.

And that is not our argument as to why there was a due process violation. Our argument is that the incarceration itself was unduly lengthy within the cases that have been cited to your Honor in the briefs. If that is found, is the city liable? Our answer is yes, because the bail schedule was the normal set way of doing things and --

THE COURT: How do I know that?

MR. SCHWERIN: Well, your Honor, again that goes back to my failings in terms of what I introduced. And I am simply addressing your Honor's statement that even if what I perceive to be -- that even if the evidentiary problems were overcome, that nonetheless you would make the same ruling based on the fact that there was no policy and that, therefore, it would do no good to allow anything further in the way of evidence. And I am only arguing to you that if we were given that opportunity to establish what I say is the sufficient evidence, that the law would not at that point automatically --

THE COURT: By testimony on those documents?

MR. SCHWERIN: Well, now, I think we're reduced to the one document now. I'm only dealing with the due process argument, so it's not dealing with the police logs.

THE COURT: Um-hum.

MR. SCHWERIN: It would only be the bail schedule and the effect that that represented, having this kind of bail, normal, everyday, regular, procedure of the Wildwood Police Department, since your Honor has already ruled for other reasons on the equal protection and identification of the officers.

MR. HANSON: Judge, to get away from all the academics, the bottom line is the plaintiff must prove, and I again quote from my notes, that the practice was so permanent and well-settled as to have the force of law. That's the bottom line. The document's in evidence, it doesn't mean anything. Mr. Schwerin and I can argue all day about the subtleties and the academic points of law and what one circuit says versus what

another circuit says. But as a factual matter, as a rule of evidence, there is nothing for this court or for the jury to decide from that piece of paper that the incarceration was caused by official custom and policy and practice established by the City of Wildwood, not the Municipal Court, but the City of Wildwood.

THE COURT: Yes.

MR. HANSON: That document in and of itself is by a judge. This court has already ruled of the distinction between the Municipal Court versus the City of Wildwood. I won't even get to the judicial immunity issue, which would certainly resolve it, because we need not get to the judicial immunity issue. The proofs are insurmountably deficient. Period, end of story. I don't mean to be curt, but we're going back and forth. And that's what this application based on Rule 50 is all about, and that's how it must be decided.

MR. SCHWERIN: Your Honor, if I may. Well, first, it's one of -- just a red herring, Mr. Hanson just threw in judicial immunity. We haven't sued the Judge. And all judicial immunity does, and it does no more, is to say that even if there was something which otherwise is a violation, we can't hold him to pay anything out of his pocket, he's not liable in damages. And we haven't sued him. So judicial immunity has nothing to do with it. It cannot cloak anyone else, whatever the Judge may have done. If anybody else had --

THE COURT: I don't need to consider judicial immunity, nor do I, in the disposition of these motions.

MR. SCHWERIN: All right, thank you, your Honor.

The only other thing I would address, I've already acknowledged more than once, and your Honor has stated that the document itself wouldn't establish the policy, there would need, and your Honor stated it, to be the testimony to go with it. And what I have asked for, and apparently your Honor has denied, is to reopen to allow me to present that testimony. Which would not be anything new, it would be a repeat of things stated in one of the depositions. And I make that proffer to the

court. By the one defendant, Mr. Sheets, as I previously stated.

THE COURT: Well, there has been some question raised as to whether Mr. Sheets could or could not do all that you seek to do through him. But, in any event, that application is denied.

The court in fairness, though, and, of course, I readily knowledge the court's responsibility to take judicial notice of the New Jersey court rule upon which you were relying, 3:4 --

MR. SCHWERIN: Yes, your Honor. I believe it's 3:4-3. Oh, I do want to address the fact that another rule was raised by Mr. Hanson in Section 7 regarding municipal courts. And I would just note to your Honor that that refers back not only to the Rule 3:4 that we rely on, but also the preceding two rules, one of which deals with arrest under warrant and, therefore, the provision he talks about simply deals with situations where a summons might be issued in place of a warrant. We're relying on Rule 3:4 which deals -- in the first place it says in there where a legal arrest takes place without a warrant. And I believe your Honor has already made the -- in dismissing the parts of the case earlier about false arrest, if there was a legal arrest and, therefore --

THE COURT: That's no longer in the case.

MR. SCHWERIN: Correct, your Honor. I'm only simply referring to that in terms of showing what the different rules deal with.

MR. HANSON: Judge, we submit the issue.

THE COURT: All right.

The motions of the defendants will be granted. The court, in reviewing all of the evidence, including now the submission of C-1, -2 and -3 into evidence, feels that a rational jury could not, looking at the evidence in its most favorable light, sustain a factual finding that the plaintiffs had sustained their burden of proving any of these defendants liable by a preponderance

of the evidence.

The motions will be granted. Thank you very much.

MR. HANSON: Thank you, your Honor.

MR. SMITH: Thank you, your Honor.

THE COURT: Submit an order.

MR. VON GLAHN: Judge, who do you want to submit an order?

THE COURT: I don't care, that's a decision that you can decide among yourselves. Thank you.

(Trial then ended)

CERTIFICATE

I, THEODORE M. FORMAROLI, Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes of the matter hereinbefore setforth.

Theodore M. Formaroli
Official U.S. Reporter
N.J. CERTIFICATE NO. 488

DATE: 8/14/85

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

- -

ANTOINETTE CONNIE ANELA, ET AL.,
PLAINTIFFS,

v. Civil No.

THE CITY OF WILDWOOD, ET AL., 83-1094
DEFENDANTS. 83-2444
- 83-2525

UNITED STATES COURT HOUSE
401 MARKET STREET
CAMDEN, NEW JERSEY 08101
JUNE 21, 1985

BEFORE: HONORABLE JOHN F. GERRY
UNITED STATES DISTRICT JUDGE

THEODORE M. FORMAROLI, C.S.R.

THE COURT: This motion seeks to set aside the directed verdicts and to have a second trial, at which the plaintiffs would introduce additional evidence. Officer Sheets would be called to the stand to lay a foundation for the introduction of daily police logs and would further testify that police officers were following the policy set by a municipal court judge of holding all misdemeanants overnight if they could not post the bail set by a bail schedule.

The Plaintiffs' Argument Is Twofold: That it was an abuse of discretion not to permit them to reopen their case so as to introduce this evidence; and that this evidence, if admitted, would have established *prima facie* violation of 42 U.S.C. Section 1983.

In granting the motions for directed verdict, we stated that even if the evidence were admitted, it would not establish a *prima facie* case. If that is correct, certainly there would be no abuse in refusing to allow plaintiffs to reopen, as directed verdicts would only have been entered anew following the introduction of this evidence.

We still believe that even treating the proffered evidence as admitted, the plaintiffs' case is fatally flawed.

The police logs are insufficient to permit the jury to engage in anything other than pure speculation as to who the allegedly wrongful acts were perpetrated by. We allowed this case to go to trial on the assumption that plaintiffs would be able at the time of trial to at least prove that the guilty party or parties was among the defendants. The police logs themselves indicate that the plaintiffs could have been booked by non-defendants and the plaintiffs themselves were completely unable to identify who did what or otherwise narrow the field. To permit the jury to randomly point the finger at one or more defendants when the acts could have been done by someone else entirely is not fair and not warranted by law, as far as this court can determine.

As far as the city is concerned, we continue to believe that the plaintiffs have proved that the allegedly illegal policy was one emanating from the state, per the municipal court judge, not the city. *Monell* requires that the illegal acts to be a basis for municipal liability be the effectuation of an official policy. The policy here effectuated was not the city's. Moreover, nothing in the New Jersey Court rules mandated that the city pursue a contrary policy. Immediate release of misdemeanants was discretionary and the municipal judge, via his bail policy, in effect took away any discretion the city might have had.

Accordingly, upon reconsideration, this court declines to alter our result, and the new trial will be denied. And the order which has been submitted will, after necessary alterations, be executed by the court. And I thank you all.

(Proceeding then ended)

CERTIFICATE

I, THEODORE M. FORMAROLI, Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter, Notary Public of the State of New Jersey and Commissioner of Deeds of the Commonwealth of Pennsylvania, do hereby Certify that the foregoing is a true and accurate transcription of my original stenographic notes of the matter hereinbefore set forth.

THEODORE M. FORMAROLI
Official U.S. Reporter
N.J. Certificate No. XI488

DATE: August 6, 1985

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

- -

ANTOINETTE C. ANELA and ANGELA
DI PIETRO, ET ALS,
PLAINTIFFS,

v. Civil No.

CITY OF WILDWOOD, ET ALS, 83-1094
DEFENDANTS. 83-2444
- 83-2525

UNITED STATES COURT HOUSE
401 MARKET STREET
CAMDEN, NEW JERSEY 08101
APRIL 6, 1984

BEFORE: HONORABLE JOHN F. GERRY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

GREENBERG, KELLEY &
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BY: William S. Greenberg, Esquire
Attorneys for the Plaintiffs

BRENER, WALLACK & HILL, ESQUIRES
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Attorneys for Defendants City of Wildwood,
William C. Mitchell and Anthony Robinson

THEODORE M. FORMAROLI, C.S.R.
OFFICIAL U.S. REPORTER

UNITED STATES DISTRICT COURT
CAMDEN, NEW JERSEY

THE COURT: Let's treat first with the punitive damages, that's the easiest one.

The city claims that its exempt from the payment of punitive damages under both 1983 and the New Jersey Tort Claims Act. The court agrees and summary judgment will be granted as to this issue. *City of Newport vs. Fact Concerts*, 453 U.S. 247 and New Jersey Statute Annotated 59:9-2 (C).

Moving onto the claims of supervisory responsibility under 1983. The city next claims that the complaint fails to plead with the requisite specificity facts sufficient to raise an issue of the city's participation in the conduct complained of.

It is, of course, correct that *Respondent Superior* will not support a 1983 recovery, but that the plaintiff must establish either a direct participation by the governing body or establish that city officials acted pursuant to an official policy or custom, for which *Monell* is the principal authority. Moreover, in the Third Circuit, facts establishing governmental responsibility must be pleaded with some specificity. *Black vs. Stevens*, 662 F.2D 181 out of our Circuit. It is correct that the complaint is rather vague in its assertions against the city and its police department. However, since discovery has proceeded in this case, rather than dismiss on the basis of a vague complaint, the court will see whether any facts have emerged to substantiate the plaintiffs' claims. This seems only fair, given the difficulty of obtaining factual information prior to suit.

The deposition of Police Chief Harry Breslin indicates that possibly in contravention of New Jersey Rules of Criminal Procedure, Rule 3:4-1(b), the Wildwood Police Department did indeed have a policy of not releasing disorderly persons at night following booking. The rule does seem to contemplate that following booking the defendant is to be released in lieu of detention. Apparently, some time after the incidents in question, Mr. Breslin met with the County Prosecutor and Municipal Court Judge who told him this policy of holding disorderly persons overnight was of questionable legality. It appears that when he explained Wildwood's particular local circumstances to them,

the transient nature of their summer population and whatnot, they gave him approval to continue the policy. Presumably under what they conceived to be one of the exceptions contained in Rule 3:4-1.

In any event, it would seem that the city may properly be held accountable under Section 1983 for the fact of continued confinement without bail. Moreover, the city may properly be held accountable for the conditions of confinement. It remains to be determined whether these things, state violations of the Federal Constitution, and the court will address that question.

However, the Fourth Amendment under Equal Protection Claims against the city must be dismissed. There is absolutely no proof within this record that the city of Wildwood authorized its police officers to arrest citizens without probable cause, or to treat similarly situated people differently in determining whether they would be allowed to immediately post bail.

Going on to the length of incarceration and the posting of bail issues. The fact of incarceration and the refusal to permit the posting of bail come down essentially to the same thing. If the plaintiffs had been allowed to post bail, their incarceration would have been at an end, obviously. We must decide then whether a 12 hour period of incarceration during which bail was refused is unconstitutionally lengthy. We note that a state's more stringent requirements of immediate release, this under Rule 3:4-1 to which the court has already allued, is irrelevant to our constitutional inquiry. State law may exceed constitutional minimums, but this fact does not serve to alter federal standards. *Fisher vs. Washington MTA*, 690 F.2D 1133 out of the Fourth Circuit. A violation of a state procedure more exacting than the federal constitutional requirements may only be redressed in a context other than Section 1983.

The Fourth Circuit as well as the Third Circuit, *Patzig vs. O'Neill*, 577 F.2D 841, have held that notwithstanding state law rules requiring either immediate release for misdemeanor offenses or at least immediate arraignment and posting of bail before a judge or magistrate, due process is satisfied if a de-

tainee is only held for a brief period; that is, for no longer than is necessary to take administrative steps incident to arrest. see *Gerstein vs. Pugh*, 420 U.S. 103. The question of what is "brief" can only be determined on a case-by-case basis, depending as it does on geographical factors, local police and court system factors, and so on. Here, for example, the late hour of the arrest may have made it impossible for arraignment and the setting of bail, or highly impractible, before the morning. However, the deposition of Chief Breslin indicates that it may have been the practice in Wildwood to set bail without an appearance before a judge based upon predetermined schedules set by a judge. Furthermore, there is as yet no explanation for why the male arrestee was allowed to post bail and the young ladies were required to wait. Thus, on the issue of the length of pretrial incarceration, summary must be denied. The old cases cited by the defendants are not persuasive. To the contrary. In this field the older authorities have varying degrees of remaining vitality.

Conditions of confinement. The plaintiffs claim that they were subjected to punishment in that they had to spend 12 hours in overcrowded cells with no food, water or mattreses.

Bell vs. Wolfish, 441 U.S. 520, states that pretrial detainees are protected by the 14th Amendment against deprivation of liberty without due process and they, therefore, have a right to be free from punishment prior to an adjudication of guilt. It is necessary then to consider whether a condition of confinement is imposed to punish or it serves a valid institutional goal which could not be served as effectively by less restrictive condition. *Union County Jail Inmates vs. Scanlon*, 537 F.Supp. 993 at 1002 out of our own district here in New Jersey two years ago, 1982. Under *Bell*, the period of time during which a detainee is subjected to a privation is relevant to a due process inquiry. What is punishment over a long period may not be punishment if temporary. The clearer the hardship, the shorter the period of time it may be continued.

Given the rather brief time invloved in this case, the court holds that what the plaintiffs experienced was not punishment

but simply an unpleasant inconvenience. While three-to-a-cell may generally be intolerable, it ought not to be so for 12 hours, particularly when it is remembered that the young ladies were not placed with strangers but were celled with each other. Certainly the deprivation of food and water is inexcusable, but again, this court finds it not to be egregious in the short haul. Accordingly, we will grant the city's motion as to this count.

Moving on to false imprisonment. The city correctly maintains that the state law claim against it is barred by the plaintiffs' failure to file a notice of claim within 90 days of the accrual of the cause of action. 59:8-8. Accordingly, this court, this count will be dismissed as to the city.

Moving onto the individual defendants, Officers Robinson and Mitchell. As the court has stated, and as the parties readily acknowledge, Section 1983 hinges upon a showing of personal responsibility because the individual officers cannot be held responsibility for the conditions of confinement in the Wildwood detention cells, the allegations against them on this issue must be dismissed. Nor, it seems, does the complaint charge Officers Robinson and Mitchell with not allowing the plaintiffs to be released or post bail or with denying them equal protection would probably be the responsibility of officers higher in the police hierarchy or with different functions on the night in question than Robinson and Mitchell to make these decisions. Presumably plaintiff has unsuccessfully tried to elicit more information as to the identity of these other persons. On the record before us, however, we cannot state with sufficient certainty that the officers were not involved in these decisions. The record may be supplemented at some future point where that decision can be made as a matter of law.

Accordingly, summary judgment as to these due process and equal protection claims will be denied at this point in time, given this record, without prejudice to later application. The officers are invited, if they can do so, to submit proof establishing their lack of involvement in the decision to hold the plaintiffs overnight and/or discriminate against them in the decision to permit or prohibited the posting of bail. The record's a little

insufficient right now for the court to make that decision, a factual resolution.

With respect to the individual defendants, we are left, then, with the allegations of arrest without probable cause in violation of the fourth amendment and state tort law. The short answer to the plaintiff's allegations of lack of probable cause is that they all pleaded guilty to the charges against them. The guilty plea far more than an adjudicated conviction, which may be based, for example, on perjuried testimony, is a conclusive admission that one committed the crime charged and, therefore, that probable cause for arrest existed. While, of course, one may plead guilty for reasons of convenience rather than by guilt, by doing so one necessarily imperials his right to later claim innocence. Accordingly, these due process and false arrest claims will be dismissed.

To summarize, then, and counsel will please track, summary judgment is granted in favor of the City of Wildwood on all issues except the issue of the 12 hour detention of plaintiffs.

Summary judgment is granted Officers Robinson and Mitchell on all issues except the due process and equal protection claims arising out of the refusal to release the plaintiffs. On these issues summary judgment is denied without prejudice.

Defense counsel will submit an appropriate order consistent with this court's rulings.

Thank you, gentlemen. I hope you make your next engagements.

MR. GREENBERG: Thank you, Judge.

MR. HANSON: Thank you, Sir.

Judge, just for clarification, the one issue on which summary judgment was not granted as to the city is on the claim of 14th Amendment due process?

THE COURT: Counsel, did you not track what I said? If you didn't, you can get it from reporter --

MR. HANSON: I did.

THE COURT: -- All of the facets that we have disposed of.

MR. HANSON: Respectfully, Sir, I'm not sure it's on the record, that's why I raised the question.

THE COURT: Well, see if it is on the record. I believe that you'll find that I covered that section.

MR. HANSON: Yes, Sir.

THE COURT: If it is not, you can ask for clarification later. Next case.

(Proceeding then ended)

CERTIFICATE

I, THEODORE M. FORMAROLI, Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter, Notary Public of the State of New Jersey and Commissioner of Deeds of the Commonwealth of Pennsylvania, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes of the matter hereinbefore set forth.

THEODORE M. FORMAROLI
Official U.S. Reporter
N.J. Certificate No. 488

DATE: April 14, 1984

Supreme Court, U.S.
FILED
OCT 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-449

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CITY OF WILDWOOD,

Petitioner,

vs.

ANTOINETTE CONNIE ANELA, ANGELA DiPIETRO, MAUREEN McDONNELL, LISA TORTIS, GINA BUCCERI and ROXANN COX COLE

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is a municipal policy established by a city's routine adherence to a bail schedule imposed by a municipal judge which is directly contrary to a statewide rule of procedure promulgated by the state supreme court?

2. Does failure to provide pretrial detainees with a place to sleep or food and water, constitute unconstitutional punishment?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit review of whose judgment is sought by petitioner, is reported at 790 F.2d 1063 and is reprinted in Appendix A to the Petition at 1a-18a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

These are three consolidated actions brought under 42 U.S.C. §1983 in which the various plaintiffs asserted violations of rights protected by the United States Constitution.

Although there are a number of misleading statements pertaining to the evidence set forth in the Petition for Certiorari, most of them will not be addressed as they do not go to the issues now before the Court. Suffice it to say that it is undisputed that plaintiffs were arrested at approximately 11:15 p.m. on the night of July 3, 1981 along with four other persons and taken to the Wildwood Police Station. The nine female arrestees, after booking procedures were completed, were kept in cells until approximately

11:00 a.m. the following morning except for one who was released in her mother's company at approximately 4:00 or 5:00 a.m. What should be noted, and is not mentioned by the petitioner, is that one of the arrested girls who is not a plaintiff here, did attempt to post bail by use of traveler's checks. She was told that she could not post bail. (Ja 157).

Testimony from the plaintiffs was consistent that no food or water was provided and that there were no sleeping facilities. At no time in this case did the City of Wildwood ever challenge those facts or give any indication in the Pretrial Order that there was any intent to present testimony or evidence about conditions in the cells.

While the City of Wildwood

makes it appear as though the nine arrested girls were kept together in cells as opposed to being sent elsewhere this is belied by their own answers to interrogatories (Ja 375) where it is indicated that there were only three cells existing for the holding of female prisoners. The nine girls were divided among these three cells evenly and certainly not as a result of any effort on the part of the Wildwood police to be accommodating.

There is no real dispute that it was regular practice in Wildwood to incarcerate persons arrested for minor offenses such as this one, unless they could meet the bail schedule set by the municipal judge. The City of Wildwood in effect conceded this in the Pretrial Order in its statement of contested fact

by indicating that the practice was that of the municipal judge and was not attributable to the City. (Ja 117). The issue of whether or not following the bail schedule set by the municipal judge could be a policy attributable to the City of Wildwood was addressed by the Third Circuit and was held to be regular practice and procedure and therefore a "policy" within the meaning of this Court's decision in Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Another issue raised in the Complaint was that the initial arrest was itself without probable cause. The trial court granted a motion for summary judgment and dismissed the cause of action based upon the guilty pleas

entered in municipal court. The Third Circuit reversed that holding and found that under New Jersey law a municipal court guilty plea could not be the basis for a finding of collateral estoppel in a later civil proceeding.

SUMMARY OF THE ARGUMENT

The Third Circuit correctly held that just as with individual citizens, a municipality and its public officials must be expected to know the law. Thus where there is a state supreme court rule requiring that persons arrested without a warrant for minor offenses be released after identification procedures are completed and a summons issued, and the city requires the posting of bail pursuant to directive of the local municipal judge, the city must bear responsibility for that regular procedure. Obeying a local judge's directive clearly contrary to an unequivocal rule of the state supreme court is a municipal policy from which liability under Section 1983 can flow.

There is no issue as to

municipal officals being constitutional scholars despite the argument set forth in the Petition for Certiorari. The Third Circuit held only that the City officials must obey the state court rule regarding release after issuance of a summons which was unequivocal and not subject to any particular court interpretation. In any event, plaintiffs here never advanced Rule 3:4-1 for any purpose other than deciding whether the practice of requiring bail was attributable to the City. The Third Circuit did not hold that violation of a state court rule is itself a constitutional violation. Accordingly, pages 14-17 of the Petition for Certiorari address a non-issue.

Finally, the conditions of the confinement of the plaintiffs in the

cells was clearly punishment and therefore unconstitutional. It is uncontested that there was no place to sleep, no food and no water during the 12 hour detention. There simply are no grounds to support such conditions as being necessary under the standards set in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d. 447 (1979).

ARGUMENT

POINT ONE

TOLERANCE OF A REGULAR PRACTICE AMOUNTS TO MUNICIPAL POLICY SUFFICIENT TO IMPOSE LIABILITY UNDER SECTION 1983.

The lead case regarding imposition of liability on municipalities under 42 U.S.C. §1983 is Monell, supra. It was stated there that municipal liability may flow from either policy or custom, and this may occur even in the absence of formal conduct. Thus, official policy may be inferred from informal acts or omissions. Where there has been no formal approval, the custom and usages of local officials may be sufficient. 436 U.S. at 690-691, 98 S.Ct. at 2035-2036. Analysis of this issue is not altered by this Court's recent decision in Pembaur v. City of Cincinnati, __ U.S. __, 106 S.Ct. 1292

(1986). That case concerned a situation where force was used to gain entrance in order to serve a capias. The record indicated that there was no practice of using force, and it had been done in this instance based on a directive from the county prosecutor. The only issue was whether that directive could be construed as policy in light of the authority granted to the county prosecutor under Ohio law. Pembaur did not address the question of whether policy may be inferred from the normal custom and practice as was specifically approved in Monell. The issue the court decided was whether an unconstitutional act could be established by a single decision of the proper policy maker. 106 S.Ct. at 1300, n.11. Since this Court in Monell approved looking to

custom before it went on to bar liability on a respondeat superior theory, the arguments advanced in the Petition for Certiorari that respondeat superior was employed by the Third Circuit in this case, are unavailing.

Nor is there any weight to the arguments raised by the City of Wildwood regarding the alleged upholding by the Third Circuit that failure to follow a state rule amounts to a constitutional violation. The District Court's ruling challenged on appeal was simply that Wildwood could not be responsible for obeying the municipal judge. The Third Circuit in reversing found that the standards for existence of a policy under Monell were met by showing that the City routinely ignored Rule 3:4-1. That holding is precisely in accord with

the prior rulings of this court in Monell and later cases such as Pembaur. Wildwood is simply trying to create an issue out of whole cloth where it does not exist. The Third Circuit did not address the question of whether the detention was unconstitutional because the District Court did not reach that issue but rather ended its analysis with the finding that there was no policy attributable to the City. Wildwood is blatently trying to induce this Court to grant certiorari by asserting that the opinion is contrary to the established law set by this Court when in fact the issue Wildwood addresses is not before this Court.

The same holds true for the City's argument that the Third Circuit opinion would require local officials to

become constitutional scholars. First, as the City acknowledges, immunity considerations do not apply to municipal liability as opposed to that of individual public employees. In any event, the Third Circuit dealt with a rule of the New Jersey Supreme Court and not with decisions interpreting standards for constitutional violations. There is nothing at all in the decision below which would unduly burden local officials. Rule 3:4-1, as a pronouncement of the New Jersey Supreme Court must be obeyed. Clearly its violation alone does not expose local officials or the municipality to damages under Section 1983 except insofar as to provide the link between any constitutional violation that may occur and municipal responsibility for such

violation. Because this question goes only to the municipality's liability and not to that of individuals, there is no problem of public officers being impeded in their duty by fear of personal liability. That problem is covered by case law regarding grants of immunity which are not relevant here.

The final element of the City's attempt to find fault with the Third Circuit on this issue is the alleged lack of an affirmative link between the injury and the policy. This is arrant nonsense. The basis of this argument is that the policy of overnight detention had nothing to do with the plaintiffs' arrest. The simple answer is that the constitutional violation to which this policy pertains is not the arrest without probable cause, which in

this case now lies only against the arresting officers. Rather the policy was considered in terms of the alleged Fourteenth Amendment violation of excessive detention after the administrative steps incident to the arrest were completed. Again the City of Wildwood is attempting to mislead this Court by making arguments having nothing to do with the issue presented to this Court. There would be nothing inconsistent with the finding on the one hand that the arrests were proper but that the respondents' rights were violated by being incarcerated overnight after booking was completed. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1974); Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985); Fisher v. Washington Metro

Area Transit Authority, 690 F.2d 1133 (4th Cir. 1982).

POINT TWO

FAILURE TO PROVIDE PRETRIAL DETAINEES WITH A PLACE TO SLEEP, FOOD OR WATER AMOUNTS TO PUNISHMENT IN VIOLATION OF THE FOURTEENTH AMENDMENT.

This Court expressly held in Bell v. Wolfish, supra, that conditions of confinement for pretrial detainees must not serve as punishment and must be related to a legitimate governmental objective. 441 U.S. 538. The conditions here which are not contested do not meet that standard and the Third Circuit correctly found that they failed the Bell v. Wolfish test.

All of the arrested respondents were placed in cells, three to a cell. Each testified without dispute that there were no sleeping facilities, the cells containing only a small bench, a sink and a toilet.

The circuit courts have found

that failure to provide bedding is a violation under Bell v. Wolfish. Thus, in Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985) a due process violation was found where Mr. Goodson was not given any bedding such as sheets and blankets in the first cell he was placed in, and then later was put in another cell with only a hard bench. In the first cell he was given roach infested food and during his eight hours in the second cell no food or water at all.

The Second Circuit dealt with a similar situation in LaReau v. Manson, 651 F.2d 96 (2d Cir. 1981). While the main issue in that case was "double bunking" where two inmates sleep in the same cell in a double bed, the court also addressed the question of having

detainees sleep on mattresses on the floor, which is more than was provided the respondents here. That practice was found to be "too egregious to warrant any such leeway. They constitute punishment without any regard to the number of days for which a prisoner is so confined." Id. at 105.

Within the Third Circuit the issue of sleeping on the floor has been addressed and again found to constitute punishment. In Union County Jail Inmates v. Di Bono, 713 F.2d 984 (3d Cir. 1983) the court addressed a situation where double bunking was offered as a cure to having people sleep on the floor. It stated that use of double bunking:

> will avoid the unsanitary and humiliating practice of forcing detainees to sleep on mattresses placed either on

> the floor adjacent to the toilet and at the feet of their cell-mates, or elsewhere in the Jail.
>
> 713 F.2d at 996.

Later in Monmouth County Correctional Institution Inmates v. Lanzaro, 595 F.Supp. 1417 (D.N.J. 1984) a former attorney general of New Jersey was appointed as a special master to review the conditions at that institution. Reviewing the special master's report, the court stated:

> He concluded that "sleeping on a concrete floor without a mattress is 'pain' and 'punishment' and that no circumstance short of an extreme, unavoidable and limited emergency could even justify inmates to sleep with only a sheet on the floor for any period of time without a mattress." SMR at 59-60. The master also concluded that "compelling pretrial detainees to sleep on mattresses placed on the floor for any period of time except in periods of emergency, constitutes

> punishment." In violation of the due process clause of the Fourteenth Amendment.
>
> 595 F.Supp. at 1424-1425.

The master recommended an order be entered prohibiting requiring any inmate to sleep on the floor without a mattress for any period of time. Id. at 1426. No objection was raised to this recommendation except for emergency circumstances. Id. at 1427. The district court ultimately ordered that inmates all be given a bed except that they might be required to sleep on the floor without a mattress in emergency circumstances and never without a mattress. Id. at 1440.

Here the undisputed testimony of the plaintiffs is that no facility was provided for sleeping purposes. No food or water was offered, and the

single request for a cup of water met with the response that there were no cups. The Third Circuit panel in this case unaminously found that it was error for the District Court to have dismissed the claim that failure to provide pretrial detainees with a place to sleep, food and water amounts to punishment in violation of the Fourteenth Amendment.

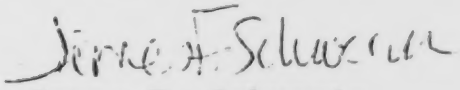
It is significant to note that any argument the City might advance is negated by the existence of Rule 3:4-1 regarding release of persons arrested for minor offenses. Had that rule been followed, these respondents and the other three girls arrested with them would not have been incarcerated at all. No attempt was made to alleviate the conditions on the night in question. It

is certainly not unreasonable to ask that persons incarcerated have access to water to drink, and if they are going to be held for more than a few hours at least some food of even the most basic kind be provided.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,



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